93-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public employer defending the constitutionality of an affirmative action plan may rely on a consent decree calling for race-conscious action to redress the effects of prior discrimination, and on the history of the litigation leading to that consent decree, as part of its justification for the challenged affirmative action plan.

2. Whether a public employer may consider statistical evidence of a manifest racial imbalance in its workforce in assessing whether it has engaged in unconstitutional discrimination that may be redressed by race-conscious affirmative action.

3. Whether an employer may utilize numerical promotional goals to redress prior discrimination when use of current promotional lists in strict rank order will fail to make meaningful progress toward eliminating the effects of prior discrimination, and when strict rank order use of those lists cannot be validated as job-related.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as the Mayor of the City of Chicago. The respondents are Chicago Fire Fighters Union Local No. 2, John M. Craven, Larry W. Anoman, Tedmund Duber, Timothy A. Andersen, Todd A. Lewandoski, Michael J. Kammerer, Robert S. Muir, Joseph Muscolino, Jeff P. McAndrews, Steven V. Parlick, Kenneth P. Bruno, Timothy J. Hayes, Joseph Pesce, Salvador Marquez, James G. Dorgan, Robert G. Michaels, Michael Greco, Richard Reimer, Michael Callahan, Robert Dreyer, James W. Fischer, Donald S. Sachula, Thomas J. Sullivan, Michael J. Sampey, Earl Billish, John Carasotti, Martin Dunne, Richard Graf, John Herling, Edward Jaquszewski, Dennis R. Smith, Henry Scavone, and John Schmidt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of Chicago and Mayor Richard M. Daley, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc, App., *infra*, at 1a-15a, is reported at 989 F.2d 890 (7th Cir. 1993). The opinion of the panel of the court of

appeals, App., *infra*, at 16a-83a, is reported at 962 F.2d 1269 (7th Cir. 1992). The court of appeals consolidated two cases that had been adjudicated separately in the United States District Court for the Northern District of Illinois. The opinion of the district court in *Chicago Fire Fighters Union Local No. 2 v. Washington*, App., *infra*, at 84a-106a, is reported at 736 F. Supp. 923 (N.D. Ill. 1990). The opinions of the district court in *Billish v. City of Chicago*, App., *infra*, at 107a-127a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves three sets of promotions in the Chicago Fire Department in which limited preferences were afforded to minority candidates. The Department utilized these preferences in order to comply with a consent decree that had ended a discrimination suit brought against the City of Chicago by the United States, and to redress long-term and pervasive discrimination within the Department, which had stunted the careers of minorities and left the upper ranks of the Department virtually bereft of blacks and Hispanics. The discrimination within the Department goes back some decades, although it continued until the mid-1980s; it led the United States to

file two separate suits against the City of Chicago, which resulted in a number of injunctive orders, and eventually a consent decree.

1. *The discrimination cases brought by the United States.* In 1973, the United States brought suit against the City of Chicago, alleging that the hiring and promotional practices of the Chicago Fire Department unlawfully discriminated against blacks and Hispanics. Billish R. 25 at Cole Aff. para. 5. At that time, less than 5% of the uniformed personnel in the Fire Department were black or Hispanic. *Id.* para. 6. The United States took an appeal from the district court's refusal to award preliminary injunctive relief against the Department's hiring practices, and the court of appeals enjoined all hiring pending appeal. *Id.* para. 7. At that point, the City concluded that it would not be able to defend the hiring claims successfully. *Id.* Accordingly, in 1974 the City entered into a consent decree that established an interim 50% hiring ratio and a long-range goal requiring the City to increase substantially the black and Hispanic composition of the Fire Department so that it would be more representative of the minority composition of the City's workforce as a whole. *Id.*[1]

The United States' suit also challenged as discriminatory the City's promotional examinations for the ranks of engineer, lieutenant, and captain. See *United States v. City of Chicago,* 573 F.2d 416. 419 (7th Cir. 1978). The district court upheld the validity of these tests under Title VII of the Civil Rights Act of 1964, as amended, see *id.* at 420, but the court of appeals reversed and remanded the case for further proceedings, see *id.* at 429. The court of appeals also enjoined all further

[1] The Department did little hiring over the next four years, and as a result the district court entered supplemental injunctive orders in September 1978 and again in June 1979, in order to ensure that an interim minority hiring ratio would remain in effect until the City made meaningful progress toward hiring minority firefighters. Billish R. 25 at Cole Aff. para. 8 & Exhs. K-L.

promotions to the ranks of engineer, lieutenant, and captain, pending further proceedings in the district court, unless all minorities on the relevant promotional lists were first offered promotions. See *id.* at 429.

In 1978, the City prepared and administered new promotional examinations for each rank in the Fire Department. Billish R. 25 at Cole Aff. para. 11. As of August 1979, when the City prepared to retire the existing promotional lists, the racial composition of the Chicago Fire Department by rank was as follows:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	99	0	1	1.0
Captain	218	12	1	6.0
Lieutenant	623	16	2	2.9
Engineer	366	13	1	3.8
Firefighter	2727	338	50	14.2

Id. para. 12.

In early 1980, the United States advised the City that it intended to file a new lawsuit challenging all four of the newly administered promotional examinations on the ground that they had a severe and unjustified adverse impact on minority candidates. Billish R. 25 at Cole Aff. para. 13. The City reviewed the United States' case and concluded that the examinations did have an adverse impact upon minority candidates and were not adequately validated. *Id.* para. 14. The City therefore decided that the case should be settled. *Id.* para. 15.

The City and United States entered into a consent decree, which the district court approved on March 31, 1980. Billish R. 25 at Exh. I. Section 1 of the consent decree required the City to make race-conscious promotions of minorities in a manner closely tailored to their numbers in the ranks eligible for promotion:

> *Long-Range Promotional Goal.* The defendants, as a long range goal, shall seek to promote black

> and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks of the City of Chicago Fire Department with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

Id.[2] Section 2(B) of the decree provides that if it proved necessary in order to meet the City's obligations to promote more minorities, the City would increase the number of minorities eligible for promotion from the 1979 engineers and lieutenants promotional lists "by reducing the cut-off score from 70, provided that any such reduction in a cut-off score need not exceed one standard deviation below the mean score obtained by black and Hispanic candidates as a group on the test involved." *Id.* Cut-off scores are set by utilizing a number of factors, including the difficulty of the test, the number of persons receiving high scores, and the estimated number of people to be promoted during the expected life of the promotion list. Billish R. 44 at Exh. A para. 3. Because some of these factors are arbitrary, the cut-off score does not necessarily define the minimum acceptable qualifications for promotion. *Id.* para. 4.

2. *Promotions from the 1979 captains list—the* Billish *case.* During the first four years that the 1979 captains list was in effect, there were sufficient qualified minority candidates promoted to lessen the disparity between the racial composition of the rank of captain and the pool of lieutenants eligible for promotion.[3] In March 1985,

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[2] Promotions are made to each rank from the rank immediately below it except in the case of lieutenant. Both firefighters and engineers are eligible for promotion to lieutenant.

[3] By January 1984, of 198 captains, 8 were black and 2 Hispanic, for a minority percentage of 5.1%, while of 718 lieutenants, 55 were black and 21 Hispanic, for a minority percentage of 10.5%. Billish R. 25 at Stensland Aff. para. 38.

however, the last minority on the 1979 captains list at or above the cut-off score of 70 or above was promoted. Billish R. 44 at Exh. A para. 10. All of the more than 50 persons promoted to captain after that were white, *id.* para. 11, and the racial disparity between the ranks of lieutenant and captain began to grow.[4]

In 1987, the Fire Department's operational needs required additional promotions to captain. *Billish v. City of Chicago*, Plaintiff-Appellants' Appendix on Appeal, Exh. V at 22-30. The Fire Department accordingly prepared to promote 18 white lieutenants to captain from the 1979 list. Billish R. 6. The City's Fire Commissioner, Louis Galante, concluded that the City's continuing use of a stale, promotional list that had been all-white for more than a year and a half was inconsistent with the consent decree, as well as with the City's contractual obligation to the Union to redress the effects of prior discrimination in the Fire Department. *Id.* at 31. Commisisoner Galante asked the Personnel Department if any minorities who had taken the 1979 captains examination were qualified for promotion. *Id.* at 28-29. The Personnel Department determined that there were two possibly qualified minorities, although their scores were slightly below 70. *Id.* at 29.

The Personnel Department then considered whether it would be appropriate, consistent with section 2(B) of the consent decree, to lower the cut-off score to enable the Fire Department to promote the two minority lieutenants to captain.[5] The Department of Personnel reviewed the

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[4] By January 1987, of 183 captains, 5 were black and 3 were Hispanic, for a minority percentage of 4.4%, while of 625 lieutenants, 63 were black and 18 Hispanic, for a 13.0% minority percentage. Billish R. 25 at Stensland Aff. para. 38.

[5] The City had twice before lowered the cut-off score for the 1978 engineers examinations: first for minority candidates pursuant to section 2(B) of the consent decree; and later for all

qualifications of the two minority candidates, determined that their scores were sufficiently high to consider them qualified for promotion, Billish R. 44 at Exh. A para. 8, and accordingly altered the cut-off score so that these two candidates could be placed on the list of those eligible for promotion. *Id.* at Exh. B at 8. Based on the Personnel Department's finding, Commissioner Galante ordered the two minority lieutenants promoted. Thus, 20 lieutenants were promoted to captain in January 1987, 18 of whom were white. *Id.* at Exh. A para. 11.

3. *The 1987 affirmative action promotional goals—the* Chicago Firefighters *case.* In 1983, when Commissioner Galante took office, he asked the City's Personnel Department to develop and administer new promotional examinations. Chicago Fire Fighters R. 71 at Joyce Aff. para. 7. The written portion of a new engineers examination was administered in January 1985. *Id.* para. 8. All firefighters were eligible to take the examination. *Id.* The practical portion of the examination was administered between July and November 1985. *Id.* para. 9. A rank order list of candidates for engineer in the order of their scores was then prepared. *Id.*

The written portion of a new captains examination was administered to candidates in September 1986. Chicago Fire Fighters R. 71 at Joyce Aff. para 11. All lieutenants were eligible to take this examination. *Id.* The oral interview component of the examination was administered in February and March 1987. *Id.* A rank order list of candidates based on their scores was then prepared. *Id.*

The racial composition of the Chicago Fire Department at the time the new engineers and captains promotional lists were compiled continued to reflect the effects of the

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candidates, because the list had remained in use longer than had been expected. Billish R. 44 at Exh. A para. 4. The City had also lowered the cut-off score for the 1978 lieutenants list in order to comply with the consent decree. *Id.* para. 7.

prior discrimination that had led to the suits the United States had filed—the manifest imbalance between the racial composition of each rank, and the rank or ranks below it from which promotions are made, had persisted, despite the City's obligation under the consent decree to reduce that disparity. The racial composition of the Fire Department by rank as of June 30, 1987, was as follows:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	97	1	1	2.0
Captain	194	5	2	3.6
Lieutenant	646	68	20	13.6
Engineer	464	44	7	11.0
Firefighter	2739	638	161	29.2

Chicago Fire Fighters R. 71 at Stensland Aff. para 19. The Chicago workforce, in contrast, was 46% minority (33% black and 13% Hispanic), according to 1980 census figures. *Id.* at Joyce Aff. para. 15.

The new engineers and captains examinations could not be validated for use in strict rank order because the City could not show that the quite small differences in scores between candidates when listed in rank order accurately predicted a difference in job performance. Chicago Fire Fighters R. 71 at Joyce Aff. para. 12 & Barrett Aff. paras. 6, 17. A test that may be valid for making distinctions between candidates with substantially different scores may not be valid for distinguishing between candidates with scores only a few points apart. *Id.* para. 16.

In deciding whether the two promotional lists would be used in strict rank order, the City's Commissioner of Personnel, Jesse Hoskins, evaluated a number of factors. In the written findings that accompanied his decision, Commissioner Hoskins noted the statistical evidence indicating that the effects of prior discrimination in the upper ranks of the Fire Department had persisted, and that this problem could be redressed only by promoting minorities

more quickly than strict rank order use of the list. Chicago Fire Fighters R. 71 at Exhs. E & F. Commissioner Hoskins also noted that the consent decree required promotion of minorities at a rate that would make the racial composition of each rank more representative of the composition of the rank eligible for promotion. He observed that without some type of race-conscious affirmative action, no meaningful progress could be made toward this goal. See *id.* Similarly, Commissioner Hoskins noted that the pertinent collective bargaining agreement required the City to promote minorities in order to redress prior discrimination, and that the lists could not be validated for use in strict rank order. See *id.* Accordingly, he concluded that both lists should be utilized with promotional goals of 20% black candidates and 5% Hispanic candidates. See *id.* Commissioner Hoskins concluded that these promotional goals would not unduly trammel the interest of nonminorities, because there was no meaningful difference between the scores of minority candidates who would be promoted out of rank order and the scores of the nonminority candidates who would be passed over, and because use of these goals would result in minority hiring at rates not substantially different from minority representation in the ranks eligible for promotion. See *id.*

Commissioner Galante then issued two promotional orders utilizing the affirmative action goals. In August 1987, he promoted 56 firefighters to engineer, including seven minority firefighters promoted out of strict rank order. Chicago Fire Fighters R. 71 at Exh. N. In October 1987, he promoted 24 lieutenants to captain including one Hispanic promoted out of strict rank order. *Id.* at Exhs. F & N.

4. *Proceedings in the district court. Billish v. City of Chicago* was brought by nine white lieutenants who alleged that Commissioner Galante's decision in January 1987 to promote two minority lieutenants to captain out of rank order deprived them of a property interest in their

promotions without due process of law, and discriminated against them because of their race, in violation of the Equal Protection Clause. Billish R. 1. The district court granted the defendants summary judgment on the due process claim, on the ground that state law granted no protectible property interest in promotions in strict rank order. App., *infra,* at 123a. The district court later granted the defendants summary judgment on the equal protection claim, on the ground that the decision to promote the 2 minority lieutenants along with 18 white lieutenants was permissible in light of the manifest racial imbalance between the ranks of lieutenant and captain, which had been exacerbated by the City's unjustifiable use of a stale, all-white promotional list. App., *infra,* at 110a.

Chicago Fire Fighters Local Union No. 2 v. Washington was brought by the Union and 20 of its white firefighter members, alleging that the promotion of minority candidates out of strict rank order in August and October 1987 violated the Equal Protection Clause. Chicago Fire Fighters R. 19. The district court dismissed the claims of 14 of the individual plaintiffs on the ground that they lacked standing to challenge the non-rank order promotions at issue. Chicago Fire Fighters R. 55. The district court subsequently granted the defendants' motion for summary judgment as to the remaining plaintiffs, concluding that the challenged promotions were part of a plan narrowly tailored to redress the continuing effects of prior discrimination in the Fire Department. App., *infra*, at 103a.

5. *Proceedings in the court of appeals.* The plaintiffs in both the *Billish* and *Chicago Fire Fighters* cases appealed. The court of appeals consolidated the two appeals for argument and decision, and invited and received an amicus brief from the United States because of the potential impact of the court's decision on the consent decree between the City and the United States.

A divided panel of the court of appeals, in an opinion by Judge Ripple and joined by Senior District Judge Grant, affirmed the judgment of the district court in the *Chicago Fire Fighters* case, and vacated the judgment of the district court in *Billish*. Turning first to the *Chicago Fire Fighters* case, the majority affirmed the dismissal of those individual claims that had been rejected for lack of standing, because those individuals would not have been promoted even if the City had proceeded in strict rank order, and because they were likely to receive promotions in subsequent promotional orders. App., *infra*, at 31a-33a. As to the merits of the equal protection challenge, the majority observed that "a necessary prerequisite to undertaking a program designed to remedy discrimination is a strong factual basis for believing that discrimination occurred." *Id.* at 34a. The opinion reviewed the four types of evidence on which the City had relied to establish its "strong basis in evidence," and found that they collectively supply a constitutionally sufficient justification for the City's conclusion that it had engaged in discrimination that it should rectify. *Id.* at 50a-51a.

First, the 1980 consent decree, as well as the history of the litigation leading up to it, established that the City had a basis for concluding that it had engaged in prior discrimination. Given the strength of the case brought against the City, the record made "clear that the City of Chicago's assessment that its policies violated the Constitution was a realistic one." App., *infra*, at 36a. Second, the Union's own agreement to an affirmative action clause in its collective bargaining agreement with the City, which required the City to promote minorities in a manner that would make their representation throughout the Fire Department more closely reflect their representation in the qualified workforce, also provided an evidentiary basis for the City's conclusion that it had engaged in prior discrimination. *Id.* at 41a. Third, the statistical evidence of a manifest imbalance in the racial composition of the pro-

motional ranks of the Fire Department allowed no probable explanation except that the City had discriminated against minorities. *Id.* at 41a-46a. Finally, some affirmative action for the rank of engineer was justified because the 1985 engineers examination could not be validated as job-related and would have had an adverse impact on the promotion of minorities if utilized in strict rank order. *Id.* at 46a-50a.

The majority then considered whether the City's promotional goals were narrowly tailored to redress prior discrimination. The majority concluded that they were because the City would not have made any meaningful progress toward eliminating the effects of prior discrimination if it used the promotional lists in strict rank order. App., *infra,* at 52a-53a. Nor could the City remedy the discrimination in the upper ranks by race-neutral procedures such as aggressive minority recruiting, because promotions to the rank of engineer and captain are made from the ranks immediately beneath them. *Id.* The affirmative action plan was also flexible, applicable only to qualified candidates whose scores were not significantly different from those of nonminority candidates, and only for so long as necessary to redress prior discrimination. *Id.* at 53a. In addition, the numerical goals were closely related to the minority composition of the ranks eligible for promotion, and hence did not unduly trammel the interests of nonminorities. *Id.* at 53a-54a. Finally, the impact of the plan on nonminorities was "minimal," since it "did not bar nonminority advancement, nor did it burden unduly nonminority candidates." *Id.* at 55a.

In the *Billish* case, the majority upheld the district court's dismissal of the due process claims, agreeing that state law did not afford any of the plaintiffs a protected property interest in receiving promotions. App., *infra,* at 69a-74a. As to the equal protection claim, the majority held that the same reasons that justified the City's affirma-

tive action plan in the *Chicago Fire Fighters* case also provided sufficient justification for believing that affirmative action was necessary. The court, however, vacated the district court's judgment and remanded the case for a determination whether the City's need for additional promotions in January 1987 was so pressing that it justified the immediate promotion of two minority plaintiffs who had scored below 70 on the 1979 captains examination. *Id.* at 74a-89a.

Judge Posner dissented from the panel's disposition of the equal protection claims in both cases. App., *infra,* at 79a-83a.

The court of appeals granted rehearing en banc in both cases.[6] By a 5-4 vote, the full court reversed the judgments of the district court in both cases, and remanded for further proceedings. Judge Posner's opinion for the majority (joined by Judges Coffey, Easterbrook, Manion, and Kanne) held that although the record showed that the City had discriminated against minorities "for at least a brief period of time after the date in 1972 on which Title VII of the Civil Rights Act of 1964 first became applicable to states and municipalities," App., *infra,* at 5a, the record did not warrant the conclusion that the challenged actions were necessary to rectify that discrimination.

The majority rejected the City's reliance on the consent decree in both cases, concluding that it "would not be a defense," since "[t]he plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination." App., *infra,* at 6a. As to the promotions challenged in the *Billish* case, the majority concluded (as had the panel) that the record was unclear whether the City could have waited until a new promotional list was available rather than making promotions out of rank order in January 1987 as

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[6] Judges Flaum and Rovner recused themselves from all proceedings on rehearing.

a remedy for the use of a stale all-white list. *Id.* at 7a-8a. As to the 25% minority promotional goal challenged in the *Chicago Fire Fighters* case, the majority rejected the City's reliance on the statistical evidence of a manifest racial imbalance between ranks in the Fire Department, because those statistics included "nonactionable" discrimination occurring prior to the effective date of Title VII. *Id.* at 11a. Considering the promotions from the 1987 engineers list, the majority concluded that there was insufficient justification to depart from rank order use of the list, since the promotional exam had been validated as job related. *Id.* at 9a-11a. Turning to the promotions to captain in October 1987, the majority concluded that the promotion of a Hispanic lieutenant out of rank order to satisfy the 5% promotional goal was suspect, because the new captains list used in strict rank order would have produced 4.7% Hispanic promotions; hence the record supported the inference that "the department was merely trying to curry favor with Hispanics by promoting a Hispanic out of rank order." *Id.* at 14a. The majority ordered the two cases consolidated in the district court for purposes of the proceedings on remand, and assigned to a single judge. *Id.*

Judge Ripple dissented, joined by Chief Judge Bauer and Judges Cummings and Cudahy, for the reasons stated in Judge Ripple's opinion for the panel's majority. App., *infra*, at 15a.

REASONS FOR GRANTING THE PETITION

We quite agree with Judge Posner's assessment, on behalf of a closely divided en banc court, that the questions presented by this case are "difficult and important." App., *infra*, at 2a. In three fundamental respects—the majority's treatment of consent decrees, statistical evidence, and numerical goals—the decision below is squarely inconsistent with the law in other circuits. The questions raised by this case have arisen repeatedly in

connection with the actions of numerous state and local governments around the country, and will undoubtedly continue to arise in the future. And the Seventh Circuit's resolution of these questions does far more than send this case to trial. By prohibiting the City from relying on the critical types of evidence by which an affirmative action plan can be justified under the law in other circuits, the en banc court largely eliminates the ability of state and local governments in this circuit to engage in meaningful affirmative action to redress prior discrimination. These "difficult and important" questions, resolved in a way so wholly at odds with the law anywhere else in this country, merit plenary review.

This Court has repeatedly held that, within carefully circumscribed limits, the Equal Protection Clause permits race-conscious affirmative action narrowly tailored to redress the effects of prior discrimination. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 509 (1989) (plurality opinion); *id.* at 518-19 (Kennedy, J., concurring in part and concurring in the judgment); *United States v. Paradise*, 480 U.S. 149, 166-71 (1987) (plurality opinion); *Local No. 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421, 480-81 (1986); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment). See also *Croson*, 488 U.S. at 511 n.1 (Stevens, J., concurring in part and concurring in the judgment). This "strict scrutiny" test, while demanding, is plainly possible to satisfy: utilizing that test this Court has twice upheld race-conscious hiring and promotional measures—in *Paradise* and *Sheet Metal Workers*—without a showing that the particular minority beneficiaries were themselves the victims of discrimination.

It is also clear from the Court's cases that an employer may have a constitutionally sufficient justification for engaging in affirmative action without a formal find-

ing or judgment that it has discriminated against minorities. In *Wygant*, seven Justices concluded that a public employer can adopt race-conscious remedial measures without such a finding as long as the employer has a sufficient basis to conclude that remedial action is necessary. See 476 U.S. at 274, 277-78 (plurality opinion); *id.* at 286, 290-92 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 305 (Marshall, J., dissenting). As Justice O'Connor wrote, "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Id.* at 289. In *Croson*, a plurality reiterated that a constitutionally sufficient basis for affirmative action is present as long as a municipality has a "strong basis in evidence for its conclusion that affirmative action was necessary." 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277) (plurality opinion). Since *Croson* at least five circuits have adopted the "strong basis in evidence" test for evaluating the propriety of race-conscious affirmative action.[7]

The record in this case details a long history of discriminatory hiring and promotional practices in the Chicago Fire Department that had left its upper ranks vastly unrepresentative not only of the Chicago workforce, but also of the ranks eligible for promotion. The Constitution permitted the City, in an effort to remedy its prior discrimination, to do more than merely discontinue its discriminatory practices, since that would leave in place

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[7] See *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992); *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1413-14 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-59 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992).

promotional ranks filled with nonminorities hired and promoted under a discriminatory system—"a departmental hierarchy dominated by nonminorities." *Paradise*, 480 U.S. at 168 (plurality opinion). And, in any event, by 1987, it had become clear that mere discontinuance of the prior discriminatory practices would not remedy the effects of discrimination in the Fire Department's upper ranks. Because minorities had entered the Department in significant numbers only recently, and new firefighters are promoted into the upper ranks only gradually, the composition of the upper ranks would remain tainted by the effects of discrimination for a generation—until most high ranking personnel retired and were replaced by personnel hired and promoted after the Department had stopped discriminating against minorities. Thus, merely discontinuing its discriminatory practices and using the promotional lists in strict rank order would have failed to enable the City to make meaningful progress toward redressing prior discrimination.

The City therefore undertook affirmative steps to bring qualified minorities into the upper ranks of the Fire Department, in order to redress their prior exclusion. Under this Court's cases and the law of other circuits, this affirmative action was lawful. The Seventh Circuit's holdings that the Constitution forbids consideration of the consent decree and statistical evidence, and that the use of even a narrowly tailored promotional goal can be second-guessed by a jury, are at odds with precedents of this Court, and flatly inconsistent with the law in other circuits.

1. The first type of evidence on which the City relied, in seeking to establish its "strong basis in evidence" for its conclusion that affirmative action was necessary, was the consent decree between the City and the United States, as well as the history of the litigation leading to the entry of that decree. The consent decree recognizes that the effects of the City's prior discrimination on the

composition of the upper ranks of the Fire Department would not be quickly undone; for this reason, the decree contains a "long range goal," requiring the City "to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made."

The racial composition of the Department in 1987 all too plainly showed that the composition of its upper ranks remained tainted by discrimination; the City had not come close to achieving the long-range goal mandated in the consent decree. And as a matter of pure mathematics, if the City had used the promotional lists in strict rank order, it would have made no progress toward this goal. Thus the City concluded that the consent decree required it to engage in affirmative action.

The en banc majority held that the consent decree was wholly irrelevant to the City's permissible justifications for affirmative action; reliance on the decree would simply "not be a defense." App., *infra*, at 6a. This is because "[t]he plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989) . . . ." App., *infra*, at 6a. The majority added that it doubted the constitutionality of the decree, since it "was entered before the *Croson* decision made clear that reverse discrimination is subject to strict scrutiny." *Id.* at 6a-7a.

The holding below—that the existence of a consent decree requiring race-conscious conduct is irrelevant in evaluating the justification for such conduct when subsequently undertaken—is squarely inconsistent with the law in at least two other circuits, which have upheld race-conscious promotions based in part on the existence of a consent decree to which the plaintiffs were not par-

ties. See *Stuart v. Roache*, 951 F.2d 446, 450-53 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1456-61 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992).[8] In *Donaghy*, the Eighth Circuit addressed this point at some length:

> Unlike a voluntary affirmative action plan, a consent decree is subject to court approval before it can take effect, is often approved only after a fairness hearing, and commonly remains under a court's jurisdiction for a number of years. Because a federal court is not just a "recorder of contracts," but "an organ of government constituted to make judicial decisions," a consent decree must meet three requirements. First, it must "spring from and serve to resolve a dispute within the court's subject matter jurisdiction;" second, it must "come within the general scope of the case made by the pleadings;" and third, it must "further the objectives of the law upon which the complaint was based." While the entry of an affirmative action consent decree does not guarantee that the plan serves a remedial purpose or is narrowly tailored, the heightened judicial oversight in a properly entered decree helps obtain that end.
>
> Accordingly, this court has recognized that when an employer is called upon to show a remedial purpose, the employer can meet its burden by producing evidence "that the employer implemented its plan . . . in adherence to a court order, whether entered by consent or after litigation." As with a voluntary affirmative action plan, an employer subject to a consent decree must also demonstrate that the plan was a response to a conspicuous racial imbalance in its workforce, and that the plan is sufficiently narrowly tailored to the remedial purpose.

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[8] See also *Jansen v. City of Cincinnati*, 977 F.2d 238, 242-44 (6th Cir. 1992), cert. denied, No. 92-1555 (May 17, 1993); *Vogel v. City of Cincinnati*, 959 F.2d 594, 599-600 (6th Cir. 1992).

Id. at 1459 (citations omitted) (quoting *Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (plurality opinion), and *Setser v. Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064 (1981)). In *Donaghy*, the court concluded that a consent decree justifies race-conscious affirmative action when "(1) that decree's purpose was remedial and a response to racial imbalance, and (2) . . . the plan was narrowly tailored." *Id.* In contrast, here the Seventh Circuit held that the decree was simply irrelevant, even when, as we explain above, the decree was the result of an overwhelming case brought by the United States, was entered in the face of a statistically significant imbalance in the racial composition of the Fire Department, and contained a long-range goal narrowly tailored to the composition of the ranks eligible for promotion.[9]

The en banc majority articulated three reasons for rejecting the City's reliance on the consent decree, but they all are without merit. First, the majority noted that the plaintiffs here were not parties to the consent decree and cited *Martin v. Wilks*. That case, however, held only that a nonminority who is not a party to litigation that pro-

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[9] As the dissenting judges below explained, the racial imbalance in the Fire Department's workforce, both at the time the decree was entered and at the time the affirmative action plan at issue was adopted, was of undeniable statistical significance. App., *infra*, at 42a-44a. Statistical variations of this magnitude are plainly an appropriate basis for affirmative action. Compare *Officers For Justice v. Civil Service Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993); *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 450-52; *Associated General Contractors*, 950 F.2d at 1414-15; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir. 1990), cert. denied, 111 S. Ct. 516 (1991), and *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990); with *Maryland Troopers Ass'n, Inc. v. Evans*, 1993 WL 143741 (4th Cir. May 6, 1993), and *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1010-11 (6th Cir. 1992).

duces a consent decree cannot be bound by the decree; the Court did not hold that the decree is of no significance in evaluating a public employer's justification for undertaking affirmative action. The Eighth Circuit made this very point in *Donaghy,* in the course of rejecting Donaghy's reliance on *Martin v. Wilks.* See 933 F.2d at 1456-58. Second, the majority noted that the consent decree contains no finding that the City had discriminated against minorities. But, as we explain above, *Wygant* settled that no prior finding of discrimination is needed for an employer to engage in affirmative action. In fact, four circuits have squarely held that the absence of a finding of prior discrimination does not bar consideration of that prior discrimination as a justification for affirmative action. See *Stuart,* 951 F.2d at 453; *Donaghy,* 933 F.2d at 1460; *Howard v. McLucas,* 871 F.2d 1000, 1008 (11th Cir.), cert. denied, 493 U.S. 1002 (1989); *Kirkland v. New York State Department of Correctional Services,* 711 F.2d 1117, 1131 n.16 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. City of Alexandria,* 614 F.2d 1358, 1365 n.15 (5th Cir. 1980). Third, the majority noted that the decree predated the adoption of the strict scrutiny test in *Croson.* That observation, however, is irrelevant, since, as we explain above, this Court has held that the strict scrutiny test permits race conscious affirmative action. It is therefore not surprising that, since *Croson,* four circuits have upheld consent decrees requiring race-conscious hiring or promotional policies when narrowly tailored to redress discrimination. See *Vogel v. City of Cincinnati,* 959 F.2d 594, 599-600 (6th Cir. 1992); *Stuart,* 951 F.2d at 453-55; *Donaghy,* 933 F.2d at 1459-61; *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1446-48 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990). The strict scrutiny test is simply not a bar to this type of consent decree.

Not only is the majority's holding at odds with *Stuart* and *Donaghy,* but, as a practical matter, it makes it nearly

impossible for public employers to comply with their obligations under consent decrees. Under the majority's holding, a public employer assessing whether it has a constitutionally sufficient basis to engage in race-conscious affirmative action may not consider the fact that it is under a consent decree obligating it to do just that. The majority has effectively required employers to disregard the binding legal obligations of a consent decree when making personnel decisions; to the extent that an employer relies on a consent decree in making personnel decisions, it has, in the majority's view, utilized a constitutionally forbidden criterion. Here the City was under a legal obligation, on pain of contempt, to make race-conscious promotional decisions, yet the court of appeals has held that the City may not constitutionally consider this fact when deciding how to promote. And while the ruling below is technically interlocutory, as a practical matter it is final—no panel of the Seventh Circuit, even in a subsequent appeal in this case after a trial, will be free to reexamine this decision of the en banc court. The decision below will remain the law of the Seventh Circuit until this Court examines the questions we now present. Moreover, as an en banc decision of an influential court, the majority's ruling will be cited throughout the country, infecting other circuits with the same uncertainty public employers in the Seventh Circuit now face in this unquestionably important area of the law.

The United States has entered a large number of consent decrees throughout the country with public employers requiring them to make race-conscious hiring or promotional decisions.[10] Under the decision below, these de-

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[10] In a brief filed in this Court in *Local No. 93, International Association of Firefighters v. City of Cleveland*, No. 84-1999, the National League of Cities advised the Court, based in part on materials obtained from the Department of Justice under the Freedom of Information Act, that it was aware of at least 69 employment discrimination suits against state and local governments,

crees will become unworkable: it will be difficult, to say the least, to comply with both consent decrees and the Constitution, if public employers must ignore their obligations under consent decrees when making decisions about how to redress prior discrimination that can withstand equal protection attack.[11] Moreover, the decision below gives no weight to the unquestionably legitimate interest in ensuring that public employers achieve "compliance with the judgments of federal courts." *Paradise*, 480 U.S. at 170 (plurality opinion) (quoting *Sheet Metal Workers'*, 478 U.S. at 485 (Powell, J., concurring in part and concurring in the judgment)). For this reason alone, the decision below merits plenary review.

2. In undertaking the affirmative action at issue in this case, the City also relied on statistical evidence of the manifest racial imbalance between the ranks of the Fire Department, establishing that the effects of the Department's prior discrimination had not yet dissipated. In *Croson* itself, the Court observed that a statistically significant racial disparity between the pool of those eligible for, and those who receive, governmental benefits gives rise to an inference of prior discrimination, and hence justifies remedial action. See 488 U.S. at 501-03; see also *id.* at 509 (plurality opinon); *Wygant*, 476 U.S. at

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either brought by or intervened in by the Department, that required affirmative action in the form of specific minority hiring and promotion goals and timetables, as part of the relief awarded. See Brief of the National League of Cities, et al., as amici curiae, at 1 n.1.

[11] The Civil Rights Act of 1991 now binds nonparties to consent decrees if they had actual notice of the decree and a reasonable opportunity to be heard before it was entered. Pub. L. No. 102-166, § 108, 105 Stat. 1076 (1991). This provision, however, will be of little assistance to public employers as to the vast majority of consent decrees that call for affirmative action, because, as here, the procedural steps required by the Act for affording a decree preclusive effect were not followed when these decrees were entered.

274-75 (plurality opinion); *id.* at 292 (O'Connor, J., concurring in part and concurring in the judgment). Since *Croson*, at least six circuits have held that this type of statistical evidence is sufficient to justify race-conscious affirmative action. See *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 450-52; *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414-15 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992); *Coral Construction Co. v. King County*, 941 F.2d 910, 918-19 (9th Cir. 1991), cert. denied, 112 S. Ct. 875 (1992); *Donaghy*, 933 F.2d at 1459-60; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir.), cert. denied, 111 S. Ct. 516 (1991).

The dissenting judges below concluded that the City had properly relied on statistical evidence, App., *infra*, at 41a-46a. The majority, however, rejected this evidence, concluding that the statistics were tainted by "*non-actionable* discrimination," *id.* at 11a (emphasis in original), namely, discriminatory hiring and promotions prior to 1972, when Title VII of the Civil Rights Act became applicable to the City. *Id.* at 12a-13a. The majority acknowledged that the City likely violated Title VII "under a 'disparate impact' theory of discrimination," *id.* at 5a, for at least some period of time after 1972, and acknowledged also that an imbalance between the racial composition of the ranks of engineer and captain and the pools eligible for promotion to those ranks persisted at the time the City undertook the affirmative action at issue. The majority believed, however, that that disparity was largely created by the City's pre-1972 practices. *Id.* at 12a-13a. The majority also recognized the possibility that the City had engaged in intentional discrimination in favor of whites before 1972, in violation of the Equal Protection Clause. *Id.* at 13a. But the majority concluded: "of this there is no evidence." The majority added that the City could not constitutionally endeavor to redress "nonactionable discrimination," since "it is difficult to see how discrimination aimed at remedying

conduct lawful when engaged in (that is, before 1972) could be thought remedial in the relevant sense and survive strict scrutiny; the Court's dicta [in *Croson*] suggest it could not." *Id.* Thus, the majority rejected the City's statistical evidence in its entirety—rather than merely concluding that it raised an issue for trial—by holding that only evidence of "actionable discrimination" will do, and that the proffered statistics were "no evidence" of unconstitutional pre-1972 discrimination.

No other circuit has ever drawn a distinction between pre- and post-Title VII statistical evidence, and with good reason—no violation of Title VII is necessary to justify affirmative action. Such remedial efforts can be addressed to constitutional violations as well. Although this Court has held that only intentional discrimination violates the Equal Protection Clause, see *Washington v. Davis,* 426 U.S. 229 (1976), that does not mean that statistical evidence showing a pattern of excluding minorities from public employment is irrelevant to the determination whether intentional discrimination has occurred, a point made by *Washington v. Davis* itself, see *id.* at 241-42, 246. Subsequently, the Court has made clear that statistical evidence that minorities are not hired or promoted in proportion to their representation in the qualified labor pool is a powerful indication of intentional discrimination against minorities. See *Hazelwood School District v. United States,* 433 U.S. 299, 307-08 (1977); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-38 (1977).

In the context of affirmative action, where, as we explain above, no prior finding of discrimination is required, but rather only a "strong basis in evidence" to conclude that remedial action is warranted, statistics are even more critical. Dicta in *Croson* itself make clear that statistical evidence is not limited to disparate impact cases under Title VII; *Croson* was a case involving municipal purchasing practices, to which Title VII does not apply, and

where only intentional discrimination is forbidden.[12] Nevertheless, in *Croson* the Court recognized that statistical evidence of a manifest racial imbalance alone could justify affirmative action: "There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.' " 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. at 307-08).

The decisions in other circuits concerning affirmative action in state and local purchasing programs amply illustrate the importance of statistical evidence even when Title VII is inapplicable. The Ninth Circuit, in the *Associated General Contractors* case, and the Eleventh Circuit, in the *Cone* case, squarely held that statistical evidence can establish prior discrimination, thereby providing a constitutionally sufficient justification for race-conscious affirmative action in purchasing programs, despite the inapplicability of Title VII and its disparate impact theory of discrimination. And in *Coral Construction*, another purchasing case, the Ninth Circuit wrote that "statistical evidence is an invaluable tool with which to evaluate an affirmative action program." 941 F.2d at 918. Thus the Seventh Circuit's rejection of statistical evidence allegedly tainted by conduct to which Title VII does not apply is at odds with the law in other circuits.

While the Seventh Circuit's ruling, as we note above, is technically interlocutory, its importance is undeniable. As a ruling of the en banc court, this decision will govern the use of statistical evidence not only through the balance of this case, but also in all subsequent cases in the Seventh Circuit, and likely cases in other circuits as well.

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[12] While 42 U.S.C. § 1981 arguably applies to discrimination in municipal purchasing, that section, "like the Equal Protection Clause, can be violated only by purposeful discrimination." *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

And the importance of statistical evidence in affirmative action cases is just as clear. Because the careers of non-minorities hired or promoted under pre-1972 discriminatory practices commonly last decades, the ranks of public agencies, particularly at the upper echelons, will remain artificially white for decades as well, unless public employers are able to take reasonable steps to redress pre-1972 discrimination. The majority's holding is even more important for activities to which Title VII does not apply —such as municipal contracting—since the majority evidently views statistics as "no evidence" of unconstitutional discrimination, and has further concluded that the strict scrutiny test forbids any effort to redress "nonactionable" discrimination. And if state and local governments may not consider statistical evidence when evaluating whether they have engaged in prior unconstitutional discrimination, an important window to the truth will be closed to them. Without such evidence, the testimony of former officials will likely be the only other source of evidence shedding light on whether there was prior unconstitutional discrimination. Of course, the likelihood that former officials will be willing to admit that they intentionally discriminated against minorities is remote, to say the least. Yet by leaving the permissibility of affirmative action largely to the candor of former officials, the majority below has ironically left the question whether state and local governments may redress prior discrimination in the hands of those most likely to be responsible for that discrimination.

3. The Seventh Circuit has also parted company with other circuits in its treatment of the propriety of promotional goals for minorities in this case. The affirmative action at issue here consists of the City's departure from strict rank order use of its promotional lists. The majority below concluded, however, that because the 1987 engineers list was developed from an examination that was content-valid (testing for skills required of successful can-

didates), there was insufficient justification to depart from its rank order use, even if rank order use would have an adverse impact on minorities. App., *infra,* at 9a-11a. And with respect to the 5% promotional goal for Hispanic captains from the 1987 list, the majority concluded that since the list as a whole contained 4.7% Hispanics, the departure from rank order to ensure that the October 1987 promotions met the goal raised an issue of fact about whether "the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order." *Id.* at 14a.

In this case, as we explain above, the only expert testimony in the record established that the small differences in scores among candidates near the top of the promotional lists could not be validated as job-related, and that strict rank order use of promotional lists would have made no progress toward redressing the conspicuous racial imbalance in the Fire Department. In fact, rank order use of the 1987 engineers list would have had a substantial adverse impact on minorities. Nevertheless, the majority below held that because the promotional examinations were content valid, the lists they produced had to be used in rank order regardless of whether strict rank order use could also be validated.

This conclusion is inconsistent with the law in two other circuits. Even a valid test, when administered to many candidates, may result in closely clustered scores, and the small differences in scores that determine a candidate's position on a promotional list often reflect no demonstrable difference in qualifications. The Second and Ninth Circuits have upheld departures from strict rank order use of content-valid promotional examinations when rank order use of the lists would have an adverse impact on minorities, and the small differences in scores could not be shown to be job-related. See *Officers For Justice v. Civil Service Commission,* 979 F.2d 721, 727-28 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993); *Bridge-*

port Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1144-49 (2d Cir.), cert. denied, 112 S. Ct. 337 (1991). This result is also dictated by the *Uniform Guidelines on Employee Selection Procedures*, which provide that if two selection procedures are equally job-related, an employer is obligated to select the one with less adverse impact on minorities. 29 C.F.R. § 1607.3(B) (1991); see *Officers For Justice*, 979 F.2d at 728.

Moreover, at least three other circuits have also held that the use of a hiring or promotional goal favoring minority candidates who have qualifications not significantly different from nonminority candidates is a narrowly tailored remedy for prior discrimination. See *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 453-55; *Donaghy*, 933 F.2d at 1459-61. Yet here, based on nothing more than a departure from rank order use of a promotional list—itself intended to comply with a promotional goal tied closely to the composition of the pool eligible for promotion—the majority invited the trier of fact to conclude that the City utilized its promotional goals to curry political favor rather than to redress prior discrimination. Thus the majority's treatment of promotional goals creates yet another split in the circuits. This one is of great importance to both public and private employers, given the frequency with which they must decide wether to use hiring or promotional lists in strict rank order.

4. The cumulative effect of the holdings of the en banc majority makes the impact of this case even greater than the sum of its parts because it so tightly circumscribes the ability of state and local governments to redress prior discrimination.

The majority's holding creates great uncertainty about whether state and local governments can comply with the large number of consent decrees that the United States has obtained as part of its efforts to identify and redress discrimination. While most of these decrees, like the one at issue here, explicitly call for race-conscious policies as

a remedy for prior discrimination, the Seventh Circuit's decision requires public employers to construct personnel policies without reference to their obligations under consent decrees. And the use of statistical evidence is forbidden unless it relates solely to post-1972 conduct, although at the upper ranks of government, most incumbents were hired or promoted before then. What is more, statistical evidence is entirely forbidden when considering affirmative action in activities not governed by Title VII. And a plaintiff can apparently raise a genuine issue of fact, entitling him to a trial, whenever an employer departs from strict rank order use of a hiring or promotional examination, because that alone raises an inference of favoritism.

This last point is perhaps most significant. If all affirmative action cases are to be tried, state and local governments can have no confidence, even if they adopt affirmative action programs based on reasonably clear evidence of prior discrimination, that they will not face a serious risk of large backpay and other awards in favor of a nonminority plaintiff. Under the decision below, any affirmative action policy, no matter how strong the documentary justification for it may be, is subject to being second-guessed by a jury. And at trial, the only type of evidence the Seventh Circuit has not disparaged is an admission of intentional discrimination; but even then the trier of fact is free to brand any non-rank order use of employment tests as a pretext to curry political favor.

Perhaps no question has more occupied this Court in the last half-century than how to identify and redress discrimination against racial and ethnic minorities. This case presents questions of critical importance to that process. The Court's plenary review of the decision below is accordingly amply warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 28, 1993

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1650

EARL BILLISH, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

No. 90-2182

CHICAGO FIRE FIGHTERS UNION, *et al.*,
Plaintiffs-Appellants,

v.

RICHARD M. DALEY, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 87 C 8731, 87 C 7295—James B. Zagel
and James F. Holderman, *Judges*

ARGUED DECEMBER 7, 1990—DECIDED MAY 4, 1992
REARGUED EN BANC DECEMBER 15, 1992—
DECIDED MARCH 29, 1993

Before BAUER, *Chief Judge*, and CUMMINGS, CUDAHY, POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. We granted rehearing en banc to examine the following difficult and important question: In what circumstances can admitted racial discrimination, challenged as a violation of the equal protection clause because committed by an organ of state government, be upheld as a proper remedial measure when there has been no trial to determine whether the discrimination can survive "strict scrutiny"? For that is the constitutional standard applicable to discrimination against as well as in favor of whites. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). A divided panel of this court upheld the district court's grant of summary judgment for the defendants in one of two cases that had been consolidated for appeal, *Billish v. City of Chicago*, No. 90-1650, but reversed it in the other, *Chicago Fire Fighters Union v. Daley*, No. 90-2182, on the ground that the district judge (a different one) had failed to apply the standard of strict scrutiny to the defendants' conduct. 962 F.2d 1269 (7th Cir. 1992). Because the district court decided the cases on summary judgment, we can affirm only if, had the record before the district court in the two cases been the record of a complete trial, the defendants would have been entitled to a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 (1986); *Cygnar v. City of Chicago*, 865 F.2d 827, 834 (7th Cir. 1989).

The cases are so similar that we can treat them as if they were one. Both involve challenges to racial favoritism in promotions within the uniformed ranks of the

Chicago Fire Department. The ranks are firefighter, engineer, lieutenant, captain, and battalion chief, but the last is not in issue. Promotions are made on the basis of competitive examination. Eligibility to sit for an examination is limited to persons in the rank below, except that a firefighter may, if he wants, sit for the lieutenant's examination, and be promoted to lieutenant, without spending any time as an engineer. The record is silent on whether there is some minimum amount of time that one must spend in one's present rank before being eligible for promotion; but as examinations for promotion are not given every year, there would be delays in promotion even if there were no required waiting periods. After an examination is administered and graded, the candidates are ranked from first to last on the basis of their grades and are placed in rank order on an eligibility list from which promotions to the next rank are made. All listed persons whose grades are above a cut-off point deemed to mark minimum eligibility—all, in short, who have a passing grade on the examination—are eligible for promotion to the next rank.

In 1986 the fire commissioner, defendant Galante, promoted eighteen lieutenants to captain on the basis of their rank order in a captains' eligibility list that had been compiled in 1979, the last time the captains' exam had been given. All the promoted lieutenants were white. Only two members of recognized minorities (blacks and Hispanics, so far as relevant to this case) were left on the list, and their scores on the captains' exam were well below the cut-off point. The commissioner asked the personnel department to lower the cut-off point, and it did. He then, early in 1987, promoted the two minority candidates to captain out of rank order. The plaintiffs in the *Billish* case are white lieutenants who had scores above the (old) cut-off point on the 1979 list and were passed over when the two minority lieutenants were promoted over them. They also complain because, the list

having become all-white after the minority lieutenants were promoted to captain, the commissioner refused to make further promotions from the list, deciding instead to await the compilation of a new list based on a new exam.

In 1987 new eligibility lists were compiled to guide promotion from firefighter to engineer and from lieutenant to captain. These lists were based on examinations administered between 1985 and 1987; part of the engineer's exam was "race normed" to improve the scores of the blacks and Hispanics who took it. From these lists Commissioner Galante in 1987 ordered the promotion of 56 firefighters to engineer and 24 lieutenants to captain. The first 48 promotions to engineer were made in rank order and included 9 minority candidates; the last 8 promotions were of black firefighters taken out of rank order. The first 23 promotions to captain were made in rank order and included 5 blacks (no Hispanics); for the twenty-fourth, the commissioner reached down for a Hispanic and promoted him out of rank order. The departures from rank order were in conformity with a 25 percent goal, established by the Washington administration, for minority promotions in the fire department. The plaintiffs in the *Chicago Fire Fighters* case are the whites passed over for promotion to engineer or captain as a result of the promotion of nonwhites out of rank order in the 1987 eligibility lists.

The blacks and Hispanics promoted out of rank order to the detriment of the promotional opportunities of the plaintiffs in these two cases were promoted because of their race or ethnicity. The equal protection clause forbids states to give preference to persons on the basis of their race (or ethnicity, but this needn't be discussed separately), even if theirs is not the white race. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 493; *United States v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989). To that extent the Constitution is truly colorblind.

The Supreme Court has, however, carved an exception for the case in which discrimination against whites is necessary to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 509; *Wygant v. Jackson Board of Education,* 476 U.S. 267, 280 (1986) (plurality opinion); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991). We must decide whether the defendants have so far succeeded in bringing themselves within the exception that no reasonable trier of fact could doubt that the discriminatory promotions described above were appropriate remedial measures; only then would the defendants be entitled to summary judgment, foreclosing the plaintiffs' right to a trial. Since a discriminatory remedy, to pass constitutional muster, must discriminate no more than is necessary to rectify the discrimination for which it is the remedy, *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 505-08; see also *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 274 (plurality opinion), we must consider not only whether the Chicago Fire Department ever discriminated unlawfully in favor of whites but also whether, if so, the curative measures taken in these two cases have been carefully designed to avoid unnecessary injury to white persons.

Although there has never been a formal judicial determination that the Chicago Fire Department ever discriminated in favor of whites, we do not understand the plaintiffs to deny that, for at least a brief period of time after the date in 1972 on which Title VII of the Civil Rights Act of 1964 first became applicable to states and municipalities, the department was in violation of that statute under a "disparate impact" theory of discrimination. The fact that when the city first came under the Act the percentage of blacks and Hispanics in the uniformed ranks of the fire department—5 percent—was far lower than

their percentage in the relevant labor market would not of course have established a violation, *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977), but the city appears to have violated the Act by not changing, when the Act became applicable to the city, the hiring practices responsible for this disparity, or showing that they were essential to the department's efficient operation. *Id.* at 309 n. 15. The objectionable hiring practices were, however, eliminated by a consent decree entered in 1974 in a suit against the city brought by the Department of Justice. Promotions were the subject of a separate consent decree, entered in 1980 in another suit by the Justice Department against the city. This decree required the fire department to compile new eligibility lists on the basis of new tests properly validated as fair to minorities, and in promoting from the old lists to engineer or lieutenant to promote one black or Hispanic for every four whites who were promoted.

Assuming, then, that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980, we come to the question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination. Even if the measures had been required by the consent decree, which they were not—the decree contained no captain's quota at all, and the quotas for engineers and lieutenants were only 20 percent and are thus exceeded by the measures challenged here—this would not be a defense. The plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989); *United States v. City of Chicago*, 978 F.2d 325, 330 (7th Cir. 1992); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1337 (7th Cir. 1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1456-58 (8th Cir. 1991). The decree moreover was entered before the *Croson* decision made clear that reverse

discrimination is subject to strict scrutiny. The civil rights amendments enacted in 1991 forbid challenges to civil rights consent decrees by persons having "actual notice" of the decree and a "reasonable opportunity to present objections" to it, 42 U.S.C. § 2000e-2(n)(1)(B)(i), but the city does not argue either that the provision applies to this case or that, if it did, it would bar these suits.

We have three sets of promotions to consider. The first, of 20 lieutenants to captain, was from an old eligibility list—that is, an eligibility list based on an examination given before the 1980 consent decree: the 1979 list of lieutenants who had taken the then most recent captain's test. The second set of promotions was of the 56 firefighters promoted to the rank of engineer on the basis of an examination given in 1985. The third set consisted of the 24 lieutenants promoted to captain on the basis of a two-part examination given in 1986 and 1987.

The city's strongest case for legitimate remedial discrimination involves the promotion of the two minority lieutenants to captain in January 1987. At the time, the only eligibility list for captain had been compiled in 1979 on the basis of an examination that had not been validated for racial neutrality. Neither of the two minority lieutenants on that list had scores above the cut-off point. The commissioner had just ordered the promotion of eighteen lieutenants from the list—all white. Only 4 percent of the captains in the Chicago Fire Department at the time were nonwhite, while 29 percent of the firefighters (the lowest rank) were. By reaching down to the two minority lieutenants who were below the cut-off point, the commissioner caused 10 percent of the promotions to captain to be of nonwhites, and this was a percentage much lower than that of nonwhites in any of the lower ranks.

Yet at the time the commissioner acted, it was plain that the compilation of a new eligibility list, one based on examinations designed under the aegis of the consent decree and therefore presumptively unbiased, was only

months away, for the department had already administered the first half of a new captains' test. And in fact by October 1987 the new eligibility list had been compiled and new promotions made from it. It is not argued that the department had a desperate need for two more captains in January, that it couldn't wait till October. It seems that, distressed by the all-white composition of the group of captains appointed in the latest round of promotions, Commissioner Galante decided to appoint possibly unqualified blacks without waiting to see how blacks would perform on a race-neutral examination. If that is what happened—a question for trial—it would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that *Cronson* requests. It should be unnecessary to add that a public employer cannot be allowed to justify reverse discrimination by the bootstrap method of an alternating sequence of racial promotions (or hires). That is, the city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list.

Of course if the city had a desperate need for twenty captains just then, and the only eligibility list it had was based on a quite possibly biased examination that had been given in 1979, a modest departure in favor of remedial racial balance might well be justified. When the new captains' examination was finally administered, 21 percent of the lieutenants promoted to captain on a strict rank-order basis with no racial favoritism were black, which is more than twice the percentage under the old list even after Commissioner Galante promoted the two black lieutenants out of rank order. But the record does not reveal whether the city had an urgent need for twenty captains and thus could not await the administering and scoring of an unbiased exam.

If on remand the promotion of the two black lieutenants out of rank order does not survive strict scrutiny, it does not follow that the *Billish* plaintiffs will win. They have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites. They will have to show that if promotions had been delayed until the 1987 list was available, and made from that list, they would have been promoted sooner than they were.

The engineer examination administered in 1985 was devised by the city, of which Harold Washington, a black, was now the mayor, with the aid of an academic expert; in consultation with the Justice Department, which had brought the suit concluded by the consent decree entered in 1980; and in apparent or at least intended conformity with the EEOC's guidelines for "content validation" of employment tests. 29 C.F.R. § 1607.5. Moreover, the examination was approved by the district court. The first part of the examination was a written test. The ratio of the minority pass rate to the white pass rate was less than the 80 percent benchmark that the EEOC and other federal agencies use to decide whether an employment test has a racially adverse impact. So the city raised the minority candidates' scores sufficiently to increase the ratio to 84 percent. Candidates could sit for the second half of the examination, a "hands on" practical test (operating a fire-engine simulator), only if they passed the written test, the scores on which, as we just noted, had been adjusted to minimize the adverse impact on blacks and Hispanics. The practical test did not require a racial adjustment, because on it the ratio of the minority to the white pass rate was 87 percent. Rank order on the eligibility list for promotion to engineer was based on performance on the practical test, weighted 10 percent by seniority.

Had the department stuck to rank order, 10 of the 56 firefighters promoted to engineer would have been black

or Hispanic, which is 18 percent, very near the quota set by the consent decree. Instead, by promoting 8 more nonwhites, taken out of rank order, the department raised this percentage to 30 percent. Yet not only had the examination been approved by the parties to the consent decree—by the Justice Department, which had originally challenged the fire department's promotion procedures as unlawfully discriminatory in favor of whites, and by the City of Chicago, which under the Washington administration could hardly be thought insensitive to the interests of minority groups. *Auriemma v. Rice,* 910 F.2d 1449, 1451 (7th Cir. 1990) (en banc); *Cygnar v. City of Chicago,* 865 F.2d 827, 835 (7th Cir. 1989); *United States v. City of Chicago,* 870 F.2d 1256, 1257-58 (7th Cir. 1989); *United States v. City of Chicago,* 894 F.2d 943, 949 (7th Cir. 1990) (concurring opinion). In addition, the scores on the examination had been altered to improve the performance of nonwhites—the practice of "race norming" now forbidden by federal law. 42 U.S.C. § 2000e-2(*l*). In these circumstances, the departures from rank order could not be justified—at least with the certitude required to head off a trial—on the ground that the order had been based on a discriminatory test.

The city has, it is true, presented evidence that the test which it devised was subtly, unconsciously, biased in favor of whites, after all. The evaluation of that evidence is a matter for trial. That the city was determined to achieve or exceed its new goal of 25 percent minority promotions, regardless of what *any* test showed, is suggested by its insistence that "content validation" is not an adequate method of validating an employment test. To validate a test for content means to establish that it tests for skills or knowledge used on the job: a typing test for secretaries, for example. The city designed the engineers' test as one that would be content validated, as distinct from a "criterion validated" test, which tests qualities predictive of or correlated with job performance (such as IQ). The

law is clear that either method of validation is proper. *Gillespie v. Wisconsin,* 771 F.2d 1035, 1040-41 (7th Cir. 1985); 29 C.F.R. § 1607.5(A). Now the city has backtracked, claiming that content validation is no good, and even suggesting that the fact that whites do better than others on a test proves that the test is biased even if it has been validated. Again, the law is to the contrary. "There is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor." *United States v. City of Chicago, supra,* 870 F.2d at 1261; see also *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 503. The city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination by departing from rank order fixed by nonbiased tests. It will require a trial to determine whether this is in fact the city's motive in repudiating its own test.

The city argues that the disparity between the percentage of minority firefighters (29) and the percentage of minority engineers (11) justified heroic efforts, even ones that might require disregarding the results of a perfectly fair test, to advance minority firefighters by way of remedy for previous discrimination in favor of whites. The disparity by itself proves little, and this for two reasons. First—a point explained next—the much larger percentage of entry-level blacks and Hispanics may reflect *nonactionable* discrimination in years past. Second, the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree. If, to take an example closer to home, law schools through their affirmative-action programs increased the percentage of minority law students to 10 percent, the fact that law school faculties were on average only 2 percent black would not be evidence of discrimination in appointments to faculty positions. The larger

fraction of minority students would be an artifact of the law schools' having lowered their admission standards and not a true measure of the pool from which faculty would be recruited.

We come to the last set of promotions. Had the city promoted lieutenants to the rank of captain on the basis of the 1987 captains' eligibility list strictly on the basis of rank order, 5 out of the 24 promotions, or 21 percent, would have been of minority candidates—all as it happened black. Apparently distressed that none of the successful candidates was Hispanic, the fire commissioner promoted a Hispanic lieutenant to captain out of rank order. The result was to increase the minority representation in the promotions from 21 to 25 percent. The city points to the very small percentage of minority captains in 1987—only 4 percent—and asks us to infer that this must have been a legacy of discrimination. Although the record contains no evidence on the required or average waiting period in one rank before promotion to the next, it is common sense that working one's way up the ladder to the fire department's second-highest rank may well take many years. Hence a consequence of the very low hiring of minority firefighters before 1974 may have been that in the middle 1980s only a tiny fraction of captains consisted of blacks and Hispanics. From this it can be argued that racial discrimination in their favor was necessary to bring the percentage of captains from these groups nearer to where it would have been but for the discrimination that the groups had experienced many years earlier.

This of course is possible, but has not been shown, and in fact is unlikely. Recall that, so far as appears, the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that the discrimination was rectified in 1974. That the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between

1972 and 1974 is implausible. Of course it is possible that the city had been violating the Constitution, and not just the standards of Title VII not yet applicable to it, before 1972, by engaging in intentional discrimination in favor of whites. But of this there is no evidence. And it is difficult to see how discrimination aimed at remedying conduct lawful when engaged in (that is, before 1972) could be thought remedial in the relevant sense and survive strict scrutiny; the Court's dicta suggest it could not. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 500; *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 289 (O'Connor, J., concurring); *Regents of University of California v. Bakke,* 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

Another possibility is that minority captains were so few in the mid-1980s not because there were so few minority hires before 1974 but because of discriminatory promotional policies not rectified until the 1980 consent decree—indeed not until later, since promotions based on validated captains' tests were not made until 1987. That is another issue requiring further exploration.

Even disregarding these points, we note that, by 1987, 14 percent of the lieutenants in the fire department were black or Hispanic, and with a higher percentage of black and Hispanic lieutenants than this—21 percent—being promoted to captain without any "race norming" or other discrimination in their favor on the captain's examination, there would in all likelihood soon have been a large percentage of minority captains even if promotions were made on a colorblind basis. The question becomes whether accelerating the process by departing from colorblind procedures was justifiable as a means for rectifying the discrimination in which the department may have engaged in the 1970s. Perhaps so, but an alternative possibility—supported by the testimony of the city's own expert that rank-order promotion from the 1987 captain's eligibility list would have yielded 4.7 percent Hispanic promo-

tions, the only problem being that there were no Hispanics in the first group to be promoted from the list—is that the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order. It is impossible to choose between these hypotheses on the basis of the record compiled in the summary judgment proceedings.

There is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons. There is fear that persons who have not been discriminated against will be advanced at the expense of persons who have neither practiced nor benefited from discrimination. The Supreme Court in the *Croson* decision made clear that cities and states would have to furnish convincing evidence that their affirmative-action programs were not of this character but were instead sensitive, good-faith measures to remedy the unlawful practices in which they had engaged in the past. The defendants have not shown this strongly enough to permit the dismissal of the plaintiffs' claims without a trial.

These cases, filed in 1987, were first argued in this court more than two years ago. We regret the delay in deciding them and would like to bring them to an end but have concluded that it was premature to terminate them by a grant of summary judgment. In the hope of expediting the proceedings that must resume in the district court we direct that the cases be consolidated in that court and assigned to a single judge.

REVERSED AND REMANDED, WITH DIRECTIONS.

RIPPLE, *Circuit Judge*, with whom BAUER, *Chief Judge*, CUMMINGS, and CUDAHY, *Circuit Judges*, join, dissenting. These cases were resolved correctly, according to the law and the facts, in the panel opinion. 962 F.2d 1269 (7th Cir. 1992). For the reasons set forth in that opinion, the judgment in *Billish v. City of Chicago* (No. 90-1650), should be affirmed in part and reversed and remanded in part. The judgment in *Chicago Fire Fighters Union v. Daley* (No. 90-2182), should be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1650

EARL BILLISH, JOHN CARASOTTI,
MARTIN DUNNE, RICHARD A. GRAF,
JOHN HERLING, EDWARD JAQUSZEWSKI,
DENNIS R. SMITH, HENRY SCAVONE
and JOHN SCHMIDT,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO and LOUIS T. GALANTE,
individually and officially,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 8731—*James B. Zagel, Judge.*

No. 90-2182

CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2,
JOHN M. CRAVEN and LARRY W. ANOMAN, *et al.*,
Plaintiffs-Appellants,

v.

RICHARD M. DALEY,* LOUIS T. GALANTE
and JESSE HOSKINS, *et al.*,
Defendants-Appellees.

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* Richard M. Daley is substituted for Harold J. Washington pursuant to Federal Rule of Appellate Procedure 43(c).

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 7295—*James F. Holderman, Judge.*

ARGUED DECEMBER 7, 1990—DECIDED MAY 4, 1992

Before POSNER and RIPPLE, *Circuit Judges,* and GRANT, *Senior District Judge.***

RIPPLE, *Circuit Judge.* While these two cases, *Billish* and *Chicago Fire Fighters,* are distinct lawsuits and were heard by different judges in the district court, the parties, counsel, legal issues, and facts in both cases significantly overlap. Accordingly, we consolidate them for purposes of decision on appeal. In both cases, nonminority members of the Chicago Fire Department (CFD) challenge as discriminatory the CFD's decisions to promote various individuals pursuant to an affirmative action program implemented by the City of Chicago (the City). They claim that those promotion decisions violated the Equal Protection Clause and, in one case, the Due Process Clause, of the Fourteenth Amendment. In both cases, the district court granted the City's motions for summary judgment. For the following reasons, we affirm the judgment of the district court in *Chicago Fire Fighters* (No. 90-2182), and we affirm in part and reverse and remand in part the judgment of the district court in *Billish* (No. 90-1650).

** The Honorable Robert A. Grant, Senior District Judge, United States District Court for the Northern District of Indiana, is sitting by designation.

I

BACKGROUND

The uniformed, non-exempt fire suppression ranks of the CFD, in ascending hierarchical order, consist of firefighter, engincer, lieutenant, captain, and battalion chief. No special training or academic achievement is required for the entry-level position of firefighter. Vacancies at the upper ranks, however, are filled from eligibility lists compiled after job-related examinations are conducted. In general, only candidates who hold the rank immediately below the rank being tested are eligible to take the examination. A firefighter, however, may sit for the lieutenant exam—and may be directly promoted to lieutenant—without spending time as an engineer. After an exam is completed, the candidates are listed on an eligibility list in rank order, *i.e.*, the highest scoring candidate is ranked first and the other candidates are numerically ranked according to their respective scores.

A. *Antecedent Litigation and Settlement Order*

These two cases present challenges to the promotion procedures employed by the CFD. These cases are not the first, however, to challenge the promotion (or hiring) procedures of the CFD. In 1973, the United States Department of Justice (DOJ) brought a civil rights action against the City claiming that the hiring and promotion practices of the CFD unlawfully discriminated against blacks and Hispanics. At the time of the suit, blacks and Hispanics comprised less than 5% of the uniformed personnel in the CFD. The DOJ moved for a preliminary injunction of the challenged practices, but the district court denied the motion. This court entered an interlocutory injunction against the City on the DOJ's discriminatory hiring claims. *See Chicago Fire Fighters Union Local No. 2 v. Washington,* 736 F. Supp. 923, 927 (N.D. Ill. 1990) (describing case history). Thereafter, the City de-

termined that it could not defend successfully against these claims. Accordingly, the City entered into a consent decree in 1974 (the 1974 consent decree), which established an interim 50% minority (black and Hispanic) hiring ratio and a long-range goal requiring the City to increase significantly the minority composition of the CFD so as to reflect ultimately the minority composition of the City.

Little hiring occurred between 1974 and 1978 in the CFD. Consequently, the interim hiring ratio established in the 1974 consent decree did little to improve the minority proportion in the CFD. Indeed, by September of 1978, minorities comprised only about 9% of the CFD's uniformed personnel. The DOJ returned to the district court seeking an order to extend through 1980 the hiring goals set forth in the 1974 consent decree. On September 12, 1978, the district court granted the motion in part; the court ordered the City to fill 120 of the next 280 firefighter vacancies with minority candidates and maintain the long-range hiring goal articulated in the 1974 consent decree. R.71 (Chicago Fire Fighters) Ex.A. In June 1979, the district court granted another DOJ motion and ordered that, if the new 1979 hiring eligibility list were used for more than two years or 500 names, 50% of all further hiring must be of minority candidates. R.71 (Chicago Fire Fighters) Cole Aff. ¶ 8.

As for promotions, the DOJ challenged as discriminatory the City's promotion examinations for engineer, lieutenant, and captain administered in the late 1960s and early 1970s. While the district court upheld the validity of these exams under Title VII, this court granted the DOJ's motion for an injunction pending appeal enjoining the City from making any permanent promotions based on the engineer and lieutenant examinations. *See United States v. City of Chicago,* 573 F.2d 416, 420 (7th Cir. 1978). Once this court reached the merits on appeal, it

determined that the district court applied the wrong legal standard in evaluating one aspect of the promotion examinations and that further findings of fact were necessary; therefore, this court reversed the decision of the district court and remanded for further proceedings. *See id.* at 416, 424-29. Furthermore, this court granted interim relief by modifying its prior injunction. We enjoined any permanent promotions based on the engineer, lieutenant, and captain promotion examinations unless the promotions were "first offered to minority candidates on the respective lists in the order of their rank thereon." *Id.* at 429. In 1978, prior to the completion of the remand proceedings, the City administered new promotion examinations for each rank in the CFD. The DOJ, in early 1980, informed the City that it intended to file a new suit challenging those promotion examinations because they had a severe adverse impact against minority candidates.

In response, representatives of the City and the CFD met together to assess the strengths and weaknesses of the DOJ's case. They concluded that the examinations indeed had an adverse impact on minority candidates, that the examinations had not been properly validated, particularly for use in ranking candidates, and that the efficiency ratings (one part of the candidate's final score) were racially discriminatory. In light of the strength of the DOJ's case, the litigation costs, and the recognition that the promotion scheme had treated unfairly black and Hispanic members of the CFD, the City decided to settle the suit. During the settlement agreement negotiations, the DOJ proposed a 1-to-4 minority/nonminority promotion ratio as an interim requirement for promotion to all ranks until new, validated promotion examinations could be administered and new promotion lists posted. The City agreed to the proposal, except to the extent that the 1-to-4 ratio applied to the ranks of captain and battalion chief. The City maintained that the ratio was not feasible considering the few minorities whose current rank made them

eligible for promotion to captain or battalion chief. The City proposed that the 1-to-4 ratio apply to the ranks of engineer and lieutenant and that a long-term promotion goal be instituted, which would require the City to increase substantially minority participation at each rank (including captain and battalion chief), so that the minority composition of each rank would mirror the racial composition of the preceding rank.

The DOJ agreed with the City's counter-proposal, and it was drafted into a settlement agreement. The district court approved the settlement agreement and incorporated it into an Order of Settlement entered March 31, 1980 (1980 settlement order). It states that

> defendants, as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks [of the CFD] with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

R.25 (Billish) Ex.I at 2-3. The 1980 settlement order further required the City to employ a 1-to-4 minority/non-minority promotion ratio for any promotions beyond number 213 on the 1979 engineer eligibility list and/or number 113 on the 1979 lieutenants list. If necessary to meet the 1-to-4 ratio, the order instructed that "the 1979 Engineer and Lieutenant Eligibility List shall be expanded by reducing the cut off score from 70." *Id.* at 3. The City also was required to compile new promotion eligibility lists consistent with the long-range goals mentioned above. The new lists had to be designed to reduce or eliminate any adverse impact on black or Hispanic candidates for promotions and had to ensure against unlawful discrimination against those candidates. Finally, the City was

required to provide appropriate training to those seeking promotion.[1]

B. *Collective Bargaining Agreement*

In 1980 the City and the Chicago Fire Fighters Union (Union) entered into their first collective bargaining agreement (CBA). R.25 (Billish) Ex.D. Subsequently, the CBA was codified as a city ordinance. It provides that, in filling promotion vacancies, promotions will "customarily" be made in rank order. The CBA also contains an affirmative action provision. R.25 (Billish) Ex.D at 64-67. Under the CBA, the City is required to comply with agreements reached and decrees issued in court actions affecting hiring and promotion, to create hiring programs with the goal of achieving "in the shortest possible time a total force in which approximately thirty percent shall be Black and fifteen percent Hispanic," and to provide promotion policies with the goal of including "Black and Hispanic personnel in all categories and all ranks in order to reach as quickly as is reasonably possible a level as close to 45% as is reasonably achievable." R.25 (Billish) Ex.A at 77. This same language has been in every CBA since 1980. R.71 (Chicago Fire Fighters) Stensland Aff. ¶ 12.

C. *Summary of Remaining Relevant Facts*

The facts underlying the *Billish* case occurred before those in *Chicago Fire Fighters.* On the other hand, from an analytical perspective, it is more useful to deal with the merits of *Chicago Fire Fighters* before turning to *Billish.*

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[1] In 1985, the DOJ moved to eliminate "any race or national origin hiring or promotional preference" in the 1980 settlement order because of the Supreme Court's then-recent decision in *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984), which the DOJ read as forbidding promotional preference based on race or national origin to non-victims of illegal discrimination. The district court denied the motion. R.71 (Chicago Fire Fighters) Ex.H.

To assist the reader, we shall set forth chronologically, at this point, a summary of the factual circumstances underlying each case. A more detailed rendition of the facts pertinent to each case will be presented with our analysis.

Following the 1980 consent decree, promotions were made from the 1979 eligibility lists for each rank. In August 1983, the new Fire Commissioner, Louis G. Galante, realized that these lists were getting stale, so he ordered the preparation of a new set of promotion examinations for each rank. These exams were prepared and given in ascending order: engineer first, lieutenant second, captain third, and battalion chief last. The first examination, the engineer exam, was not administered until 1985. The engineer eligibility list was posted in 1986. Next, a lieutenant exam was administered, and a lieutenant eligibility list was posted. In the fall of 1986, the first part of a two-part captain examination was given. In December 1986, Commissioner Galante determined, according to the City, that he had an operational need for additional fire captains. Because the captain examination was not complete, and thus a new captain eligibility list was far from ready, Commissioner Galante looked to the 1979 list to make these promotions. On December 25, 1986, he ordered the promotion of eighteen lieutenants to captain (and, at the same time, ordered promotions in the other ranks), effective January 16, 1987. The eighteen promotions were made in rank order from the 1979 eligibility list, and each of the promotees was white. Soon thereafter, Commissioner Galante inquired of the City Personnel Department whether there were any black or Hispanic lieutenants remaining on the 1979 list. He was told there were two minority lieutenants on the list but, because both had scored below the cut-off score of 70, that cut-off score would have to be lowered before they could be eligible for promotion to captain. Commissioner Galante asked the Personnel Department to lower the passing score. The Personnel Department determined that

the scores and additional experience of these two lieutenants were sufficient to qualify them for promotion and, on this basis, certified them for promotion on January 12. On January 13, Commissioner Galante ordered their promotion to captain, out of rank order, effective the same date the December promotions were to become effective, January 16. By May 1987, the second half of the captain examination had been administered but the new captain eligibility list had not yet been drawn up. Commissioner Galante considered promoting five additional captains, but he decided to wait until the new captain eligibility list was ready.

In June and July of 1987, in two separate letters, Commissioner of Personnel Jesse E. Hoskins informed Fire Commissioner Galante that promotions to engineer and captain "should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1, Ex.F at 1. In August 1987, Commissioner Galante issued an order to promote fifty-six firefighters to engineer from the new engineer eligibility list. The first forty-eight, including seven black firefighters and two Hispanic firefighters, were promoted in rank order. However, the last eight were black firefighters who were promoted out of rank order. R.71 (Chicago Fire Fighters) Ex.L, Ex.N. In October 1987, the new captain eligibility list was posted and Commissioner Galante promoted twenty-four lieutenants to captain. The first twenty-three were promoted in rank order, including five black lieutenants, but the twenty-fourth lieutenant—a Hispanic—was promoted out of rank order. R.71 (Chicago Fire Fighters) Ex.M, Ex.N.

The *Billish* suit was brought by nine white fire lieutenants who were next on the 1979 captain eligibility list when Commissioner Galante lowered the cut-off score to allow the two minority lieutenants to be promoted in Jan-

uary 1987. The *Billish* plaintiffs challenge the lowering of the cut-off score and the subsequent promotions, as well as Commissioner Galante's refusal to draw further from the 1979 captain eligibility list. The *Chicago Fire Fighters* suit was brought by the Union and twenty-two white firefighters and lieutenants who were passed over in the affirmative action promotions to engineer and captain in August and October 1987. In both cases, plaintiffs sued under 42 U.S.C. § 1983 for violations of their rights under the Equal Protection Clause. In addition, the *Billish* plaintiffs asserted a violation of their due process rights.

II

ANALYSIS

A. *Applicable Standards*

Both district courts granted the City's motions for summary judgment on the equal protection claims. The *Billish* court also granted the City's motion for summary judgment on the plaintiffs' due process claim. We review de novo a district court's grant of summary judgment. *Doe v. Allied-Signal Inc.*, 925 F.2d 1007, 1008 (7th Cir. 1991). Our task is to determine whether the record reveals that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). "A motion for summary judgment is not an appropriate occasion for weighing the evidence; rather, the inquiry is limited to determining if there is a genuine issue for trial." *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). We " 'must view the record and all inferences drawn from it in the light most favorable to the party opposing the motion.' " *Lohorn*, 913 F.2d at 331 (quoting *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989)).

Both the *Billish* and *Chicago Fire Fighters* plaintiffs charge that the City's affirmative action promotions violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In an equal protection challenge, affirmative action programs are subject to strict scrutiny analysis. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 520 (1989).[2] Strict scrutiny is used to determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493. Under strict scrutiny, affirmative action must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest. *Id.* at 505-08; *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality). We address both of these requirements in relation to the issues raised by each case.

B. *Chicago Fire Fighters Union Local No. 2 v. Daley* (No. 90-2182)

1. Facts

The *Chicago Fire Fighters* case involves promotions from the 1986 engineer eligibility list and the 1987 captain eligibility list.

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[2] In *Croson*, a plurality composed of Justices O'Connor, White, Kennedy, and Chief Justice Rehnquist was joined by Justice Scalia, in concurrence, in holding that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." 488 U.S. at 493-94 (plurality), 520 (concurrence). Indeed, Justice Marshall noted the significance of this holding in his dissent: "Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures." *Id.* at 551. While this position previously had been asserted in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (Justice Powell, joined by Justice Rehnquist and Chief Justice Burger), 285-86 (concurrence of Justice O'Connor), it failed to gain majority approval.

During 1985, the City, in cooperation with the CFD and the Personnel Department, administered a two-part engineer examination consisting of a written test and a simulator (or hands-on) test. All firefighters were eligible to take the written exam. When the written part of the exam was scored, the City realized that the exam had a severe adverse impact on minorities.[3] Therefore, to minimize the effect of the adverse impact, the Personnel Department standardized the scores. All firefighters who passed the written test qualified to take the simulator portion of the examination, in which they operated specially designed pumps similar to those used by the CFD. The simulator portion of the exam accounted for 90% of the total score; seniority comprised the other 10%. In February 1986, the City posted the new engineer eligibility list.

In June and December of 1986, the new engineer eligibility list was used to promote two sets of firefighters to engineer. In June 1987, Commissioner of Personnel Hoskins informed Fire Commissioner Galante that the third set of engineer promotions from the new list "should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1. Commissioner Hoskins stated that the affirmative action was necessary to comply with the affirmative action directives of the 1980 settlement order and the current CBA. Moreover, the affirmative action was necessary to "remedy the effects of past discrimination." *Id.* at 2. Commissioner Hoskins also indicated that failure to promote on an affirmative action basis would violate Title VII because the engineer promotion procedure, when used as a ranking device, had an adverse impact on minorities. Accordingly, in August 1987, Commissioner Galante issued an order

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[3] The reasons behind the City's conclusion that the written test had an adverse impact are discussed below. *See infra* pp. 30-34 [46a-51a].

that eventually promoted fifty-six firefighters to the rank of engineer. The last eight firefighters—all black—were promoted out of rank order.

The City administered a two-part captain examination in the fall of 1986 and the spring of 1987. This examination consisted of a written test and oral interview. The written portion accounted for 65% of a candidate's score, the oral interview 25%, and seniority 10% of the total score. Because, in the oral interview, some administrators gave lower average scores or narrower ranges of scores than others, the Personnel Department standardized these scores to neutralize the differences. The passing score was set at 70. On July 13, 1987, the City canceled the 1979 captain eligibility list and made the new captain eligibility list effective.

On July 9, 1987, Commissioner Hoskins notified Commissioner Galante that promotions to captain should also be made with the goal of promoting 20% black and 5% Hispanic. Thus, in October 1987, Commissioner Galante issued an order promoting twenty-four lieutenants to the ~~rank of~~ captain. The first twenty-three were promoted in rank order, the final lieutenant—a Hispanic—was promoted out of rank order.

The Union and certain nonminority members of the CFD holding the rank of firefighter or lieutenant (collectively "*Chicago Fire Fighters* plaintiffs" or "plaintiffs") brought a two-count complaint against the City under 42 U.S.C. § 1983 alleging that the out-of-rank promotions subjected them to discrimination in violation of the Equal Protection Clause. In Count I, the firefighter plaintiffs maintained that the promotions prevented them from being promoted to engineer. In Count II, the lieutenant plaintiffs contended that the promotions prevented them from being promoted to captain. The City moved for summary judgment.

2. Holding of the district court

The court established the framework for its analysis by recognizing that, under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a court must apply strict scrutiny to an affirmative action policy to determine whether it violates the Equal Protection Clause. "To survive this heightened scrutiny," the court noted, "the policy must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest." *Chicago Fire Fighters Union Local No. 2 v. Washington*, 736 F. Supp. 923, 926 (N.D. Ill. 1990).

The court first addressed the compelling governmental interest component of the strict scrutiny analysis. The court agreed with the City that there would be a compelling interest "in remedying past (and present) racial discrimination in making promotional decisions." *Id.* While a " 'contemporaneous or antecedent finding of past discrimination by a court or other competent body' " is not a prerequisite to a public employer's voluntary affirmative action program, *id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 (1986) (O'Connor, J., concurring)), the district court stated that there must be some showing of prior discrimination by the governmental entity involved. Moreover, the court observed that, as a factual matter, a governmental body engaging in affirmative action must show a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " 736 F. Supp. at 926 (quoting *Croson*, 488 U.S. at 500). Relying on *Wygant*, 476 U.S. at 277-78, 293, the court noted that, while the City had to establish a strong basis for the propriety of its remedial action, the *Chicago Fire Fighters* plaintiffs retained the ultimate burden of demonstrating that the out-of-rank promotions were unconstitutional. 736 F. Supp. at 926. The court then recounted the history of DOJ's litigation against the City and the resulting affirmative action directives contained in the 1980 settlement order, and the affirmative action goals embodied in

the CBA between the City and the Union. *See id.* at 927-29. The court concluded that evidence of prior discrimination was provided by our rulings in *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). *See* 736 F. Supp. at 928. The court also discussed the disparities between the minority representation in the engineer and captain ranks and the representation in the ranks immediately below them, and the discriminatory adverse impact of the engineer examination on minorities. *See id.* at 929-31. Based on this evidence, the court concluded that "there is no genuine issue of material fact that the City had a strong basis in evidence for its conclusion that its affirmative action promotions were necessary." *Id.* at 931-32.

The court next turned to the issue of whether the affirmative action program was narrowly tailored to accomplish its purpose. Relying on *United States v. Paradise*, 480 U.S. 149 (1987), the district court identified several factors relevant to this inquiry: the necessity of the relief and availability of alternative remedies; the flexibility and duration of the remedy; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on third parties. *Id.* at 932. The court concluded that each of the factors favored the affirmative action remedy implemented by the City. Therefore, the court held that "there is no genuine issue of material fact that the City's affirmative action goals at issue here were narrowly tailored to their remedial purpose." 736 F. Supp. at 933. Having found that the affirmative action program served a compelling governmental interest and that the program was narrowly tailored to serve that interest, the court granted the City's motion for summary judgment.[4]

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[4] The court also held that, regardless of its ruling on the equal protection claim, Fire Commissioner Galante and Commissioner of Personnel Hoskins were entitled to qualified immunity because, in promulgating the affirmative action program, they were performing a discretionary function and their conduct was not contrary to " 'clearly established statutory or constitutional rights of

3. Standing of plaintiffs who were not passed over

Initially, we consider the *Chicago Fire Fighters* plaintiffs' contention that the district court erred in granting the City's motion to dismiss for lack of standing thirteen of the twenty firefighter plaintiffs and one of the two lieutenant plaintiffs. In reviewing a motion to dismiss for want of standing, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 498. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Supreme Court articulated the minimum constitutional requirements for standing:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Id. at 472 (quoting *Gladestone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon v. Eastern*

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which a reasonable person would have known.'" 736 F. Supp. at 933-34 (quoting *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990)). Plaintiffs raised this on appeal as an "Issue for Review," but failed to make any argument to this court other than a brief comment in a footnote to their brief that the grant of qualified immunity was "premature." Appellant's Br. at 41 n.25. We need not consider a claim presented in such a perfunctory manner. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.) (collecting cases), *cert. denied*, 112 S. Ct. 141 (1991). Even if the issue were properly briefed, we would not reach it because our disposition of the merits of the case renders moot any question of qualified immunity.

Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

In the City's view, the affirmative action did not cause the dismissed plaintiffs any injury. The City argued before the district court that, even had the promotions been made in strict rank order, those plaintiffs would not have been offered promotions. *See* Memorandum Opinion and Order of January 20, 1989, (R.55 (Chicago Fire Fighters)) at 5.[5] The district court began by noting that the City did not bypass any of the thirteen firefighter plaintiffs or the lieutenant plaintiff when the City certified eight black firefighters and one Hispanic lieutenant for promotion on the basis of race. *Id.* at 7-8. Furthermore, the court declined to accept the plaintiffs' argument that they sufficiently alleged standing because they were currently threatened by a recurrence of the out-of-rank-order promotions. The court reasoned that, before the challenged promotions, promotions were based on strict rank order, and the City had not conceded nor had the plaintiffs alleged that the City would make future promotions out of rank order. *Id.* at 9. Therefore, the court granted the City's motion.

The district court's ruling was correct. The plaintiffs in question suffered no direct injury from the non-rank-order promotions. As the court noted, even had the City made the promotions in strict rank order, those fourteen plaintiffs would not have been promoted. *Cf. Donaghy v. City of Omaha*, 933 F.2d 1448, 1455 (8th Cir. 1991) (plaintiff would not have had a "distinct and palpable injury" if he would not have been promoted had the promotions been made in strict rank order), *cert. denied*, 112 S. Ct. 938 (1992). The plaintiffs contend, however, that, because the City has expressed its willingness to continue to pursue affirmative action promotions, they have standing

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[5] *See Chicago Fire Fighters Union Local No. 2 v. Washington*, No. 87 C 7295, 1989 WL 6770 (N.D. Ill. Jan. 20, 1989).

based on a threat of future injury. To satisfy the standing requirement under this theory:

> The plaintiff must show that he . . . "is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the . . . threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (quoting *Golden v. Zwickler,* 394 U.S. 103, 109-10 (1969)); *see O'Shea v. Littleton,* 414 U.S. 488, 497 (1974) (plaintiff must base standing on more than speculation and conjecture that harm will occur in the future). The plaintiffs' allegation that they will be injured in the future is speculative. Even if the City pursues affirmative action, the vast majority of the promotions to engineer and captain will be in rank order. Given the plaintiffs' positions on the eligibility lists, they will most likely be promoted in the course of the next promotion.[6] Therefore, we affirm the district court's dismissal of certain plaintiffs for lack of standing.

4. Equal protection analysis

a. compelling governmental interest

The basis for the *Chicago Fire Fighters* lawsuit was the promotion of certain minority firefighters and a minority lieutenant out of rank order from the 1986 engineer and

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[6] As the City notes, after the promotions at issue here, the highest ranking of the firefighters dismissed from the lawsuit was ranked twelfth on the engineer eligibility list and the lowest ranking firefighter was ranked fortieth. The lieutenant dismissed from the lawsuit was ranked second on the captain eligibility list. If the City follows the same procedure for its next hiring as it did in this case, it will promote forty-eight firefighters in rank order and eight out of rank order. All of the firefighters dismissed from the lawsuit would, therefore, be promoted. The lieutenant dismissed from the lawsuit would also likely be promoted, given his high ranking.

1987 captain eligibility lists. The City argues that it had a compelling interest in making these out-of-rank-order promotions—the elimination of the effects of past and present discrimination in the CFD promotion procedure. Rectifying the effects of identified discrimination within a state or municipal jurisdiction has been recognized as a compelling governmental interest. *See Croson*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.), 509 (plurality); *Paradise*, 480 U.S. at 167 (plurality); *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment). However, a necessary prerequisite to undertaking a program designed to remedy discrimination is a strong factual basis for believing that discrimination occurred. In *Wygant*, Justice O'Connor stated that she "agree[d] with the plurality that a contemporaneous or antecedent *finding* of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." 476 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). Societal discrimination, however, is not enough; there must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274 (plurality). In *Croson*, writing for a majority of the justices, Justice O'Connor clarified the type of showing necessary to justify affirmative action. There must be a " '*strong basis* in evidence for [the defendant's] conclusion that remedial action was necessary.' " 488 U.S. at 500 (emphasis added) (quoting *Wygant*, 476 U.S. at 277). As the district court correctly observed, while the City must demonstrate a "strong basis" for the affirmative action, the plaintiffs bear the ultimate burden of proving that the City violated their rights. *Chicago Fire Fighters*, 736 F. Supp. at 926.[7] The

[7] As the *Wygant* plurality noted, "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an

City maintains that it had a strong basis for its conclusion that prior discrimination existed in the CFD and, therefore, the affirmative action promotions were necessary. It gives four reasons to support this assertion. We shall examine each.

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affirmative-action program." 476 U.S. at 277-78. In her separate concurrence, Justice O'Connor explained the significance of this statement:

> In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the [School Board] introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board has a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

Id. at 292-93 (O'Connor, J., concurring in part and concurring in the judgment). *Croson* did not directly address this issue. Like other circuits that have considered the matter, we rely upon *Wygant*. *See Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992); *Howard v. McLucas*, 871 F.2d 1000, 1006 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989); *see also Stuart v. Roache*, 951 F.2d 446, 451 (1st Cir. 1991), *petition for cert. filed*, No. 91-1516 (Mar. 20, 1992); *Hammon v. Barry*, 813 F.2d 412, 445 (D.C. Cir. 1987) (Mikva, J., dissenting); *cf. Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1036 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989).

(i) prior litigation and the 1980 settlement order

The City entered into the 1974 consent decree concerning hiring and the 1980 settlement order concerning promotion only after extensive litigation with the DOJ. The City argues that the litigation history and the 1980 settlement order provide a strong basis for concluding that affirmative action promotions to the rank of engineer and captain were necessary to remedy prior discrimination. We believe that the entire litigation history of the CFD on the issue of racial discrimination in its ranks provides strong support for the City's position.

We shall not repeat here the factual basis for the initial suit. *See supra*, pp. 11-13 [26a-28a]. A brief summary will make it clear that the City of Chicago's assessment that its policies violated the Constitution was a realistic one. The DOJ brought suit against the City in 1973 to challenge as discriminatory the hiring and promotion procedures in the CFD. On interlocutory appeal of the district court's denial of the DOJ's motion for preliminary injunction, this court temporarily enjoined the City from further hiring pending resolution of the appeal. Soon thereafter, in 1974, the City determined that it could not defend successfully its hiring practices and thus agreed to abide by a consent decree which established a temporary minority hiring ratio and a long range goal of substantially increasing minority representation in the CFD. This action suggests that the DOJ had established a discrimination case likely to succeed on the merits. Thus, the 1974 consent decree provides strong evidence of prior discriminatory *hiring* practices in the CFD.

In 1978, reviewing a later DOJ challenge to the CFD's *promotion* practices, this court enjoined promotions stemming from the 1969 engineer, 1970 lieutenant, and 1973 captain examinations unless the promotions were first offered to minorities on the eligibility lists. *See United States v. City of Chicago*, 573 F.2d 416, 429 (7th Cir.

1978). During remand proceedings in 1978, the City administered a new set of promotion examinations for each rank in the CFD. After the DOJ announced its intention to challenge the adverse impact of these new examinations, the City agreed to enter into the 1980 settlement order. This order required the City to create and implement long-range promotion goals to increase substantially the minority composition of each rank of the CFD so that each rank would represent more closely the composition of the preceding rank. R.71 (Chicago Fire Fighters) Ex.B at 2-3. More specifically, the settlement order required the City to promote one black or Hispanic for every four whites promoted from the 1979 engineer and lieutenant eligibility lists until new, validated promotion examinations for these ranks were administered. R.71 (Chicago Fire Fighters) Ex.B at 3. While the captain rank was not subject to the 1-to-4 minority/nonminority promotion ratio, the negotiation history of the settlement order reveals that this difference was due to the absence of enough blacks and Hispanics on the 1979 captain eligibility list to support such a ratio. R.71 (Chicago Fire Fighters) Cole Aff. ¶ 16. The 1980 settlement order, like a consent decree, was subject to judicial review and approval. "While the entry of an affirmative action consent decree does not guarantee that the decree serves a remedial purpose or is narrowly tailored, the heightened judicial oversight inherent in a properly entered decree helps attain that end." *Donaghy*, 933 F.2d at 1459; *see also Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991) (consent decree requiring affirmative action promotions in police force upheld under strict scrutiny), *petition for cert. filed*, No. 91-1516 (Mar. 20, 1992).[8]

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[8] At this court's invitation, the DOJ submitted a brief as amicus curiae on the issue whether the 1980 settlement order required the City to undertake the affirmative action challenged in this case. The DOJ suggests that material issues of fact exist regarding the extent to which the effects of pre-1980 discrimination, which was the subject of the 1980 consent decree, were adequately remedied

Despite the specific hiring ratios and long-term goals, however, by 1987, the percentage of minority captains (3.6%) had actually decreased from the percentage in 1979 (6.0%) and the percentage of minority engineers (11.0%) was still less than half the percentage of minority firefighters (29.2%). R.71 (Chicago Fire Fighters) Cole Aff. ¶ 12, Stensland Aff. ¶ 19. Faced with this situation in 1987, the City concluded that affirmative action was necessary to comply with the 1980 settlement order. The City's compliance with the 1980 settlement order was " 'supported not only by the governmental interest in eradicating [the City's] discriminatory practices, it [was] also supported by the societal interest in compliance with the judgment of federal courts.' " *United States v. Paradise*, 480 U.S. 149, 170 (1986) (quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 480 (1986)); *see also Ustrak v. Fairman*, 781 F.2d 573, 577 (7th Cir.) (consent decree establishing preference for minorities alone not enough to "carry the day" in affirmative action case), *cert. denied*, 479 U.S. 824 (1986). On this basis, we agree with the district court that "although there exist no formal findings of past discrimination in the CFD, the litigation history of the CFD's past hiring and promotion practices offers at least some

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by affirmative action between 1980 and 1986. Until this issue is resolved, the DOJ argues, it is impossible to determine whether, in 1987, the settlement order necessitated further affirmative action. Amicus Br. at 20-23. However, as the City notes, while the percentage of minorities had increased substantially in the lower ranks, these changes were not filtering up to the upper ranks. The minority representation in the captain rank had actually decreased. Thus, the racial disparity between the ranks that existed in 1980 remained a problem in 1987. Furthermore, as the City also points out, the settlement agreement had not been modified or vacated and thus still had the force of law. Supplemental Br. of Appellees at 7-8. We are persuaded that there is no genuine issue of fact that effects of pre-1980 discrimination remained to be eradicated as of 1987 and, thus, the standing settlement order properly contributed to the City's strong basis for engaging in the affirmative action at issue here.

evidence of past discrimination." *Washington,* 736 F. Supp. at 929.

The *Chicago Fire Fighters* plaintiffs contend that the litigation history provides no evidence of past discrimination because no formal finding of discrimination was made during the litigation. No such finding was necessary. As noted previously, *see supra* p. 18 [34a] in *Wygant,* six justices held that a government body may engage in affirmative action without a court or other government body formally finding that the government body previously discriminated. *See* 476 U.S. at 277-78 (plurality, including O'Connor, J.); *id.* at 287, 289-92 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 304-05, 312 n.7 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting); *see also Donaghy,* 933 F.2d at 1459 ("Formal findings of past discrimination need not precede a public employer's adoption of a remedial affirmative action plan."). Indeed, as Justice O'Connor has warned:

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law."

Wygant, 476 U.S. at 290 (citations omitted) (quoting *Regents of the University of California v. Bakke,* 438 U.S. 265, 364 (1978)). Instead, both *Wygant* and *Croson* teach that the touchstone for affirmative action is whether the government entity had a "strong basis" to conclude that remedial action was necessary. *See Croson,* 488 U.S. at 500; *Wygant,* 476 U.S. at 277-78 (plurality), 286 (O'Connor, J., concurring in part and concurring in the judgment); *see also Davis v. City & County of San Fran-*

cisco, 890 F.2d 1438, 1446 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990); *Howard v. McLucas*, 871 F.2d 1000, 1007-08 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989).

The *Chicago Fire Fighters* plaintiffs further contend that the City's reliance on the litigation history as a basis for its compelling interest is a "mere afterthought." The plaintiffs concede that the City took the 1980 settlement order into account in 1987 when it decided to engage in affirmative action, but submit that the City never mentioned the 1970's litigation until it became embroiled in this lawsuit. The record belies this argument. In Personnel Commissioner Hoskins' June 16 and July 9, 1987, letters to Commissioner Galante recommending affirmative action in the ranks of captain and engineer, Commissioner Hoskins cited the litigation history among the reasons compelling affirmative action.[9] Thus, the litigation history is not "mere afterthought," but contributed to the

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[9] Personnel Commissioner Hoskins' letters both included the following passage:

> The unfortunate reason for this [disparity among the ranks] is past discrimination by the City. Prior to the late 1970s, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, i.e., unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

R. 71 (Chicago Fire Fighters) Ex.E at 2, Ex.F. at 2. Commissioner Hoskins also noted, as an additional reason for affirmative action promotion, the CFD's interest in maintaining community confidence and trust. Commissioner Hoskins observed that the CFD, like the police department, "is a community service organization which needs the trust and cooperation of the community it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels." R. 71 (Chicago Fire Fighters) Ex.E. at 4, Ex.F. at 4.

City's basis for concluding that affirmative action was necessary.

(ii) the collective bargaining agreement

The City also maintains that the CBA between the City and the Union necessitated the remedial action taken in this case. As we discussed, the CBA requires the City to comply with affirmative action decrees and agreements reached in court actions and to promote with the goal of including minorities at all ranks to "reach as quickly as is reasonably possible a level as close to 45% as is reasonably achievable." R.82 (Chicago Fire Fighters) Ex.3 at 87. The district court acknowledged that "[t]he existence of an affirmative action goal in a [CBA] alone may not be sufficient" to provide the City with a strong basis for concluding that non-rank-order promotions were necessary. 736 F. Supp. at 929. Nevertheless, as the district court concluded, while the affirmative action provisions in the CBA may not prove the existence of past discrimination, they certainly corroborate it.

(iii) minority underrepresentation statistics

Next, the City maintains that statistics showing minority underrepresentation in the CFD ranks provided strong evidence that past discrimination still had a strong effect in the CFD. "[S]tatistics can be an important source of proof in employment discrimination cases . . . ." *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307 (1977).[10] The district court noted that "a statistical im-

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[10] Although *Hazelwood* was a Title VII case rather than an equal protection case, the statistical methodology used in Title VII cases is also probative in equal protection analysis. *See Croson*, 488 U.S. at 509 ("Where there is a sufficient statistical disparity between the number of qualified minority contractors willing and able to perform a service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.") (citing Title VII cases); *Id.* at 500 (a prima facie case of Title VII violation is evidence of compelling governmental interest under equal protection analysis).

balance sufficient for a Title VII prima facie case would satisfy the constitutional requirement that the City have a 'strong basis' for believing that remedial action was required." *Chicago Fire Fighters,* 736 F. Supp. at 929. Indeed, the district court cited the City's statistics as "the strongest evidence of past discrimination in the CFD." *Chicago Fire Fighters,* 736 F. Supp. at 929.

As noted, a prerequisite for promotion to engineer or captain is a candidate's position as firefighter or lieutenant. Thus, for purposes of evaluating underrepresentation in the engineer and captain ranks, the appropriate statistical comparison is between the percentage of blacks and Hispanics in those ranks and the percentage of blacks and Hispanics in the firefighter and lieutenant ranks. "The 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.'" *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650 (1989) (quoting *Hazelwood,* 433 U.S. at 308 n.13); *EEOC v. Chicago Miniature Lamp Works,* 947 F.2d 292, 302 (7th Cir. 1991); *see Croson,* 488 U.S. at 501-02; *Janowiak v. Corporate City of South Bend,* 836 F.2d 1034, 1039-40 (7th Cir. 1987), *cert. denied,* 489 U.S. 1051 (1989); *see also Mayor of Philadelphia v. Educ. Equality League,* 415 U.S. 605, 620 (1974). A significant statistical disparity between the ranks would support an inference of past racial discrimination. *See Wards Cove,* 490 U.S. at 650; *Croson,* 488 U.S. at 509 (plurality); *Bazemore v. Friday,* 478 U.S. 385, 398 (1986); *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 337-39 (1977). In June 1987, when Commissioner Hoskins requested the affirmative action promotions, 11% of the engineers were minorities, compared to 29.2% of the firefighters; and 3.6% of the captains were minorities, compared to 13.6% of the lieutenants. *See Chicago Fire Fighters,* 736 F. Supp. at 930. As the district court observed, if the difference between the expected

percentage of minorities and the observed percentage of minorities in the relevant labor pool is more than two or three standard deviations, then the hypothesis that promotions were made without regard to race would be suspect.[11] The City presented uncontradicted evidence that the difference between the expected percentage of minority engineers and the actual percentage of minority engineers was 8.7 standard deviations, and the difference between the expected percentage of minority captains and the actual percentage of minority captains was 3.96 standard deviations. R.80 (Chicago Fire Fighters) Supplemental Aff. ¶¶ 2, 4. "[A] range of four to five standard deviations corresponds to a probability range of 1 chance in 15,786 to 1 chance in 1,742,160." *Ottaviani v. State Univ.*, 875 F.2d 365, 372 n.7 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Thus, the odds that the

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[11] *See Hazelwood*, 433 U.S. at 309 n.14; *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977); *Chicago Miniature Lamp Works*, 947 F.2d at 300 n.4. Helpfully, the Second Circuit recently explained that

> [s]tandard deviation analysis measures the probability that a result is a random deviation from the predicted result—the more standard deviations the lower the probability the result is a random one. Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance. A finding of two or three standard deviations (one in 384 chance the result is random) is generally considered highly probative of discriminatory treatment.

Waisome v. Port Auth., 948 F.2d 1370, 1376 (2d Cir. 1991) (citations omitted). The Supreme Court has cautioned against a bright-line approach to statistical analysis: "We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 n.3 (1988). *But see Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1131 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

disparity among the ranks occurred by chance are in the neighborhood of 1 in 10,000. These numbers reveal disparities "well beyond the possible effect of chance," and therefore support an inference of past discrimination. R.80 (Chicago Fire Fighters) Supplemental Aff. ¶ 2.

The *Chicago Fire Fighters* plaintiffs present several challenges to the use of statistical comparison as evidence of past discrimination. They first argue that the City cannot rely on the statistical comparisons between the labor pools because the City did not consider the statistics when it decided to engage in affirmative action. Because the City did not fashion the remedial relief based on such statistics, in the plaintiffs' view, the City cannot now proffer those statistics as part of its "strong basis" for employing remedial relief. This argument fares no better than the argument that the City's reliance on the litigation history was a "mere afterthought." *See supra,* p. 24. Commissioner Hoskins in fact relied on the minority underrepresentation statistics as one justification for the affirmative action in his letters to Commissioner Galante. R.71 (Chicago Fire Fighters) Ex.E. at 2, Ex.F at 2.

The plaintiffs also suggest that in *Cox v. City of Chicago,* 868 F.2d 217, 222 (7th Cir. 1989), this court concluded that underrepresentation statistics are no longer relevant to disparate impact analysis. They characterize the inquiry here as a disparate impact case and argue that underrepresentation statistics are thus irrelevant to this case. This is not a disparate impact case; the suit brought by the plaintiffs is a section 1983 action based on the constitutional right to equal protection. Again, at this point in the case, we are dealing with the City's defense that it had a "strong basis" for its determination that affirmative action was necessary to remedy prior discrimination. This inquiry—the City's self-assessment of the relevant situation before it—could be analogized to disparate treatment analysis just as well as to disparate impact analysis; the statistics suggest a pattern or practice

of past intentional discrimination as much as they suggest that the past promotion procedures had an adverse impact on minorities. In reality, the City considered the statistics for neither purpose but, rather, as evidence that the hiring and promotion practices that the DOJ challenged in the 1970s and early 1980s had not yet been remedied.[12] Thus, the City's reliance on underrepresentation statistics as part of its "strong basis" for concluding that remedial action was necessary is not inconsistent with *Cox*.

The plaintiffs next argue that the district court should have narrowed the comparative labor pools by considering only the persons in each preceding rank who are eligible for promotion. Particularly, plaintiffs suggest that the relevant labor pools are those firefighters who actually took the 1985 engineer examination and those lieutenants who actually took the 1986-87 captain examination, rather than the complete firefighter and lieutenant ranks. In support of this argument, plaintiffs again draw an analogy to *Cox*, in which statistics were used to illustrate the discriminatory effect of the City's promotion mechanism, specifically the "captain rule," which states that only candidates who have passed the captain examination are qualified to take the battalion chief exam. 868 F.2d at 219-20. In *Cox*, this court held that the proper comparative labor pool was not the pool of all lieutenants

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[12] In his letters to Commissioner Galante, Personnel Commissioner Hoskins followed his recitation of the underrepresentation statistics with an explanation of the litigation history. *See supra* note 9. Immediately following the litigation history, Commissioner Hoskins concluded:

> Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is needed to correct the effects of such a long history of discrimination. Further affirmative action is therefore necessary.

R.71 (Chicago Fire Fighters) Ex.E. at 2, Ex.F. at 2.

but, rather, the pool of lieutenants who had sufficient experience to be eligible for promotion to battalion chief. *Id.* at 221-22. However, as the City notes, *Cox* is not analogous on this point because the comparisons there were made to illustrate the disparate impact of the promotion hurdle which separated the two groups. Here, as just discussed, the comparisons are made to show that the current upper ranks in the CFD remain affected by *prior* discrimination. More fundamentally, evidence in this case suggests that the minority representation among those eligible for promotion to engineer and captain was diluted by prior discrimination; therefore, the comparison between complete ranks is a more appropriate measure of past discrimination.[13]

(iv) adverse impact of the 1985 engineer examination

Finally, the City contends that the adverse impact of the 1985 engineer examination contributed to its compelling governmental interest in affirmative action. After comparing the passing rates for white, black, and Hispanic firefighters, the City concluded that the examination taken as a whole—including the written exam as well as the practical exam—had an adverse impact. In drawing this conclusion, the City relied upon the Uniform Guidelines on Employee Selection Procedures, which contain a bright-line "four-fifths" test for determining whether a scored examination has an adverse impact when used as a selection procedure:

> A selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be re-

[13] The plaintiffs also contend that the district court improperly shifted the burden of proof to them. We find the court's allocation of the burden of proof in harmony with the principles that govern an affirmative action case. *See supra* note 7 and accompanying text.

> garded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4(D) (1978).[14]

The engineer examination consisted of two parts. The first part was a written exam, which was administered on January 19, 1985. The raw scores of this test revealed that it had a severe adverse impact under the four-fifths rule. To counteract this, the City "standardized" the scores by converting the mean scores and standard deviations of the white, black, and Hispanic groups of test-takers to a single mean and standard deviation. The City then set a passing score which allowed the top 617 test-takers to pass. This procedure lessened the adverse impact of the written test.[15]

Those who passed the written examination were eligible to take the practical examination. A few chose not to. The results of the practical examination, when considered separately from the results of the written test, did not

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[14] In 1978, several federal agencies, including the Equal Employment Opportunity Commission (EEOC), the Department of Labor, the Civil Service Commission, and the Department of Justice simultaneously adopted these Guidelines.

[15] The relevant numbers for the standardized written test are:

Race	White	Black or Hispanic	Total
Applied	817	348	1165
Passed Written	454	163	617

Joyce Aff., R.71 (Chicago Fire Fighters), ¶ 10; R.76 (Chicago Fire Fighters) Ex.11 "Data Summary". The white success rate was .56 (454/817), while the black and Hispanic success rate was .47 (163/348). Comparatively, the success rate for blacks and Hispanics was greater than four-fifths (4/5) (or eighty percent) of the rate for whites: .47/.56 = 4.2/5 or .84. Thus, the written examination, after standardization, did not have an adverse impact when used as a pass/fail means of evaluation.

reveal an adverse impact.[16] The City drew up a rank-order eligibility list, calculating rank scores from the practical examination scores (90%) and seniority (10%). On June 5, 1986, the CFD promoted the fifty top-ranked firefighters to engineer. Breaking down these fifty promotions into racial groups and comparing the numbers with the numbers of persons who took the practical exam, the City noted that the success ratio for blacks and Hispanics was more than four-fifths that of the success ratio for whites, and thus the rank-order promotion did not have an adverse impact. On December 25, 1986, the CFD promoted thirty-three more firefighters to the rank of engineer. This time, however, when the numbers of persons of each race promoted were compared with the numbers who took the practical, an adverse impact was evident. But, if the two groups of promoted firefighters were *pooled together* for comparison with the group that took the practical, there was no adverse impact. On this basis, the rank-order promotion was approved.

Nevertheless, the City realized that, beginning with the third set of promotions, the use of the eligibility list for rank-order promotions would have an adverse impact: when either the third group of promotions or the pool of all three groups of promotions were compared with the group of firefighters who took the practical examination,

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[16] The relevant numbers for the practical exam are:

Race	White	Black or Hispanic	Total
Took Practical	410	147	557
Passed Practical	357	111	468

Joyce Aff., R.71 (Chicago Fire Fighters), ¶ 10. The white success rate was .87 (357/410), while the black and Hispanic success rate was .76 (111/147). Comparatively, the success rate for blacks and Hispanics was greater than four-fifths (4/5) (or eighty percent) of the rate for whites: .76/.87 = 4.4/5 or .87. Thus, the practical examination, considered in isolation from the written examination, would not have an adverse impact if it were used as a pass/fail means of evaluation.

the numbers revealed that the practical examination had an adverse impact when used as a rank-order device. Furthermore, when the written and practical portions of the 1985 examination were considered together, the calculations revealed that the overall examination had an adverse impact.[17] This adverse impact of the overall examination means that even if the eligibility list were used as a pass/fail promotion device—for example, if names form the list were drawn randomly for promotion orders—the use of the list would have an adverse impact. The City thus argued that, with this information available, it had reason to believe that promoting from the 1986 engineer eligibility list in strict rank order would be discriminatory and could subject it to Title VII liability. The district court agreed. *See Chicago Fire Fighters,* 736 F. Supp. at 931.

The plaintiffs concede that the statistics reveal evidence of adverse impact. Nevertheless, they argue that such evidence only begins the inquiry. The examination cannot be declared discriminatory unless it is *not* job-related, and the plaintiffs maintain that the simulator (or hands on) portion of the exam was clearly job-related. In *Cox* we noted that, once a device is found to have had an adverse impact, the focus shifts to whether the challenged promotion device is job-related. 868 F.2d at 222 n.3. As one

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[17] The relevant numbers for the overall examination are:

Race	White	Black or Hispanic	Total
Applied	817	348	1165
Passed Practical	357	111	468

Joyce Aff., R.71 (Chicago Fire Fighters), ¶ 10. The success rate for whites was .44 (357/817), while the success rate for blacks and Hispanics was .32 (111/348). Comparatively, the success rate for blacks and Hispanics was thus less than four-fifths (4/5) (or eighty percent) of the rate for whites: .32/.44 = 3.6/5 or .73. Thus, the examination as a whole had an adverse impact on black and Hispanic firefighters.

court commented, "a prima facie case is established by a showing that an examination has an adverse racial impact on minority candidates. Thereafter, legitimate, job-related explanations for differences in score distributions become relevant to rebut the prima facie showing of adverse racial impact." *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 224 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985). In response, the City submits that neither the practical nor written parts of the examination were properly validated as job-related.[18] The City also points to expert testimony in the record to support its contention that the examination could not have been validated. R.71 (Chicago Fire Fighters) Barrett Aff. ¶¶ 16, 17; *Chicago Fire Fighters*, 736 F. Supp. at 931. Thus, the City had a basis for concluding that the 1985 engineer examination had an adverse impact on black and Hispanic firefighters, especially when used as a rank-order device. This evidence contributes to the "strong basis" which the City seeks to establish for its remedial action in this case. *See Croson*, 488 U.S. at 500 (a "strong basis in evidence" supporting "remedial action" may be shown by something "approaching a prima facie case of constitutional or statutory violation").

The City presents the four grounds we have just discussed to establish that it had a "strong basis" for its conclusion that racial discrimination pervaded hiring and promotion practices at the CFD and that, consequently, it has a compelling interest in taking remedial action. The City's evidence with respect to some of the bases may be stronger, from a quantitative or qualitative point of view, than it is with respect to others. The district court

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[18] *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1049 (7th Cir. 1991) ("[A]n employment practice that results in a disparate effect on a protected group might still survive Title VII if it is sufficiently job-related to constitute a business necessity."); *see also* 29 C.F.R. §§ 1607.5, 1607.14 (Guidelines' directives for validation).

was on solid ground, however, in holding that, when evaluated in the aggregate, the evidence establishes that there is no genuine issue of material fact as to whether the City had a strong basis for concluding that the personnel structure of the CFD was a product of racial discrimination.[19]

b. narrowly tailored

In addition to having a compelling governmental interest for remedial action, the remedy chosen must be narrowly tailored to accomplish its purpose. *Croson*, 488 U.S. at 507; *Paradise*, 480 U.S. at 171 (plurality); *Wygant*, 476 U.S. at 280 (plurality); *Cygnar v. City of Chicago*, 865 F.2d 827, 838 (7th Cir. 1989). The purpose of the affirmative action promotions was "to address the problem caused by the city's past discrimination in hiring and promotion: the low percentage of Black and Hispanic captains and engineers" and "to comply with the long-term goal of the consent decree." Appellee's Br. at 37. As we assess the propriety of the City's affirmative action,

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[19] Relying on selected language in *Croson*, the *Chicago Fire Fighters* plaintiffs maintained that the City's affirmative action was invalid because it was not *legislatively* enacted. We need not discuss this issue because the plaintiffs never raised it squarely before the district court. It is axiomatic that an appellant cannot present an argument for the first time on appeal, and therefore the plaintiffs' legislative-enactment argument is waived. *See, e.g., Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990) ("any arguments in opposition to summary judgment not properly raised in the district court are waived"). In any event, we note that the determination that past discriminatory conduct required these remedial measures was made by those officers of municipal government charged with the responsibility for compliance with the settlement order and other orders of the federal courts. Finally, we note that the collective bargaining agreement between the Union and the City requiring the City to comply with the decrees and agreements reached in court was enacted as an ordinance of the City. We deal here with an effort to remedy identifiable racial discrimination in a specific institution (the CFD) in a specific municipality (Chicago). Chicago's public officials were remedying Chicago's problem—not an amorphous societal problem.

we are mindful that "the 'tailoring' requirement is to be interpreted both carefully and flexibly, for there is no universal answer to the problem of remedying racial discrimination." *Donaghy v. City of Omaha,* 933 F.2d 1448, 1461 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 938 (1992). As the Supreme Court has recently confirmed in *Croson,* 488 U.S. at 507, in determining whether race-conscious remedies are narrowly tailored, we utilize several factors, including (1) "the necessity for the relief and the efficacy of alternative remedies"; (2) "the flexibility and duration of the relief, including the availability of waiver provisions"; (3) "the relationship of the numerical goals to the relevant labor market"; and (4) "the impact of the relief on the rights of third parties." *Paradise,* 480 U.S. at 171 (plurality); *see Stuart v. Roache,* 951 F.2d 446, 454-55 (1st Cir. 1991), *petition for cert. filed,* No. 91-1516 (Mar. 20, 1992); *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1447 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 248 (1990); *Howard v. McLucas,* 871 F.2d 1000, 1008 (11th Cir.), *cert. denied,* 493 U.S. 1002 (1989). After reviewing the record, we believe that the district court correctly determined that "the City's policy of affirmative action promotions was narrowly tailored to serve its remedial ends." *Chicago Fire Fighters,* 736 F. Supp. at 932.

First, with regard to the necessity for the relief and the efficacy of alternative remedies, Personnel Commissioner Hoskins noted in his 1987 letters to Fire Commissioner Galante that the decision to pursue affirmative action promotions was arrived at "only after concluding that no other approach would permit meaningful affirmative action progress." R.71 (Chicago Fire Fighters) Ex.E at 3, Ex.F at 3. Because promotions to the rank of engineer and captain are made from the ranks immediately beneath those ranks, some race-neutral procedures for increasing minority representation, such as aggressive recruiting, would not correct discrimination in the upper

ranks. Thus, contrary to the plaintiffs' suggestion, this is not a case like *Croson*, in which the government entity failed to consider any alternatives to race-based relief. *Cf. Croson*, 488 U.S. at 507 ("there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").

Second, the affirmative action was flexible and limited in duration. The promotions were to be made "with the *goal* that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1, Ex.F at 1 (emphasis added). A goal is by definition "more flexible than an unyielding quota." *Chicago Fire Fighters*, 736 F. Supp. at 932. Furthermore, as the district court noted, under the affirmative action promotions, no unqualified minority had to be offered a promotion. *See Paradise*, 480 U.S. at 177-78 (plurality) (remedy flexible because it required qualified applicants and did not require "gratuitous promotions"). This case demonstrates adherence to that principle. The plaintiffs do not challenge the qualifications of those minority candidates promoted out of rank order. The record also reflects that the affirmative action program was limited in duration. It was designed to last three years or until 350 promotions were made to engineer or 150 promotions to captain. *Cf. Donaghy*, 933 F.2d at 1461 (consent decree narrowly tailored in part because limited to seven years). Indeed, Commissioner Hoskins indicated that the "goals are temporary" and stated that "to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action program goals will be reevaluated on an annual basis." R.71 (Chicago Fire Fighters) Ex.E at 4-5, Ex.F at 4-5. In short, the policies were of limited duration and were annually reviewed.

Third, with regard to the relationship of the numerical goals to the relevant labor market, at issue are the goals

set forth in Commissioner Hoskins' letters to Commissioner Galante on June 16, 1987 (engineers) and July 9, 1987 (captains): "the goal that 20% of the persons promoted . . . would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1, Ex.F at 1. The district court considered the relevant market to be the members of the ranks from which promotions are drawn: the pools of firefighters and lieutenants in 1987. However, even if we narrow the relevant labor market to the pools of engineers and lieutenants who had passed the recent eligibility tests and made the 1986 (engineer) and 1987 (captain) eligibility lists, the goals of the City were sufficiently related to the labor market. Using this more demanding methodology, of the 557 candidates ranked on the 1987 engineer eligibility list, 112 were black (20.1%), 35 were Hispanic (6.3%), and the remaining 410 were white (73.6%). The engineer promotion goals are clearly realistic in light of the racial composition of this labor market. Of the 341 candidates on the 1987 captain eligibiilty list, 42 were black (12.3%), 15 were Hispanic (4.4%), and the remaining 284 were white (83.3%). There is a disparity between the 12.3 percent of black lieutenants available for promotion and Commissioner Hoskins' announced goal of 20 percent black promotions. While we cannot say that this disparity constitutes the sort of "outright racial balancing" condemned in *Croson*, 488 U.S. at 507, we believe that, in other circumstances, it would deserve more careful scrutiny than that given it by the district court in this case. Here, however, it is clear that the disparity made no difference in the outcome of this litigation. At issue is the October 1, 1987, promotion of twenty-four lieutenants to captain. The first twenty-three of these promotions were made in rank order, including the rank-order promotions of five black lieutenants. Only the twenty-fourth promotion, that of a Hispanic lieutenant who was ranked fortieth, was made out of rank order.

Finally, the impact of the relief on nonminorities is minimal. The affirmative action program did not bar nonminority advancement, nor did it burden unduly nonminority candidates. *See Vogel v. City of Cincinnati*, No. 91-3474, 1992 WL 45451, at *4 (6th Cir. Mar. 13, 1992). As will be discussed in the context of the *Billish* plaintiffs' due process claim, the nonminority candidates were not entitled to rank-order promotion. The CBA provides that promotions will "customarily" be made in rank order, but also requires the City to pursue affirmative action hiring and promotion goals. Arbitrators have interpreted the CBA to permit out-of-rank-order promotions. Furthermore, the plaintiffs do not refute the City's determination that, as of May 1989 (two years after the implementation of the affirmative action promotions), 73% of those promoted from the 1987 captain eligibility list were nonminorities, and 77% of those promoted from the 1986 engineer eligibility list were nonminorities. Thus, the plantiffs' opportunities for promotion have not been denied, but postponed. Postponing a promotion opportunity for qualified nonminorities is less intrusive than denying them any future promotion opportunity.[20] In fact, by September 1988, approximately a year after the promotions in dispute, each of the *Chicago Fire Fighters* plaintiffs not dismissed for lack of

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[20] *See Paradise*, 480 U.S. at 183 (plurality); *see also Howard*, 871 F.2d at 1009-10. Neither is, of course, as intrusive as terminating existing jobs. The plaintiffs suggest that an alternative to the affirmative action promotions would have been a program of incentives to persuade incumbent engineers and captains to retire early. We cannot even assess the propriety of the plaintiffs' argument, however, because the plaintiffs had occasion, and yet failed, to present the argument to the district court for its consideration. The argument cannot now be raised for the first time on appeal. *See, e.g., Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990) ("any arguments in opposition to summary judgment not properly raised in the district court are waived").

standing had been promoted or offered the opportunity for promotion.[21]

Relying on *Croson*, the plaintiffs also contend that the City's affirmative action program could not be narrowly tailored because the beneficiaries under the program had not been identified as victims of past discrimination. In the plaintiffs' view, an individual beneficiary of an affirmative action program must have personally been a victim of the past discrimination that is being remedied. *Croson* faulted the City of Richmond's affirmative action plan because "there [was] no inquiry into whether or not the particular [minority business] seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." 488 U.S. at 508. The plaintiffs contend that the district court erred by not inquiring "whether any minority group member who would be awarded a preferential promotion[] to Engineer or Captain had been the victim of past discrimination." Appellants' Br. at 44-45.

After a careful review of the *Croson* decision, as well as opinions of this and other circuits, we cannot accept the plaintiffs' contention that *Croson* requires affirmative action plans to be limited to identifiable victims of the precise past discrimination that is being remedied. The Supreme Court's demand in *Croson* for an "inquiry into whether or not the particular [minority business] seeking a racial preference has suffered from the effects of past discrimination by the city" cannot be read without reference to the particular factual setting of the case. 488

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[21] Plaintiffs Craven, Duber, and Anderson were promoted to engineer and plaintiff Fischer was promoted to captain effective May 1, 1988. R.71 (Chicago Fire Fighters) Ex.N Personnel Order of April 22, 1988. Plaintiffs Lewandowski and Muir were promoted to engineer effective July 1, 1988. R.71 (Chicago Fire Fighters) Ex.N Personnel Order of June 22, 1988. Plaintiff Kammerer waived an offer of promotion to engineer on July 29, 1988, and plaintiff Anoman waived an offer of promotion to engineer on September 2, 1988. R.71 (Chicago Fire Fighters) Stensland Aff. ¶ 21.

U.S. at 508. The City of Richmond adopted an affirmative action plan that required contractors awarded city construction contracts to subcontract 30% of the dollar amount of each contract to Minority Business Enterprises (MBEs). An MBE was defined as a business from *anywhere* in the United States that was at least 51% owned by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. *See* 488 U.S. at 469-70. The Court concluded that the plan was not narrowly tailored because, in part, Richmond had never identified the prior discrimination it was attempting to remedy. MBEs were defined so broadly that the potential beneficiaries included ethnic groups that may never have been represented in the City of Richmond. Therefore, the plan was simply too broad to be *remedial*. *See id.* at 506-08. The factual context of *Croson* thus suggests that the Court was concerned that affirmative action programs be narrowly tailored enough to remedy only proven local discrimination, rather than attempting to remedy "societal discrimination."

Similarly, the jurisprudential context in which *Croson* was decided confirms that the Court did not intend to overturn its prior approval of "race-conscious" relief programs that are not necessarily individual-victim conscious. It must be remembered that the Court has said specifically that affirmative action plans need not benefit only identifiable victims. In *Local 93, International Association of Fifefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986), a Title VII case, the Court held that "voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." This principle, expressed many times by the Supreme Court,[22] was re-

[22] *See also United States v. Paradise*, 480 U.S. 149, 166 (1987) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject

iterated in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), by Justice O'Connor—the author of the *Croson* majority opinion—when she wrote that, with respect to the tightness of the means-end fit, "the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.* at 287 (concurring opinion). Justice O'Connor also stated that "[t]he Court is in agreement that . . . remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Id.* at 286. Furthermore, Justice Powell, writing for Chief Justice Burger and Justices Rehnquist and O'Connor, noted that "[public schools] are under a clear command from this Court . . . to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary." *Id.* at 277. Justice Powell also noted that, "in order to remedy the effects of prior discrimination, it may be necessary to take race into account." *Id.* at 280.

Croson did not question the continuing validity of these cases. *Croson* focused on the fact that the Richmond plan potentially benefitted minority businesses from all across the country, including businesses owned by minority groups against whom there was no evidence of discrimination in Richmond. Thus, it is not surprising that the majority of circuits that have addressed

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to discrimination.") (plurality); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 480 (1986) ("We have consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination.") (plurality) (citing *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986), *Fullilove v. Klutznick,* 448 U.S. 448 (1980), *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971)).

this issue, including this circuit, have read *Croson* to require that, for an affirmative action program to be considered narrowly tailored, there must be a showing of prior discrimination against the racial or ethnic *group* that benefits under the program. In *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991), the Ninth Circuit upheld a plan which benefitted groups that had suffered discrimination:

> [T]he plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest.

The court specifically addressed the argument at issue:

> We find [the plaintiff] unlikely to prevail on its argument that tailoring the remedy to specific minority groups is insufficient to meet constitutional requirements, and that to pass constitutional muster any remedy adopted must provide redress only to specific individuals who have been identified as victims of discrimination. To reach any other decision would thwart the Supreme Court's directive in *Croson* that race conscious remedies may be permitted in some circumstances. As pointed out by the district court, "an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous."

Id. at 1417 n.12 (citations omitted). In *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992), the Eleventh Circuit contrasted the affirmative action plan under scrutiny with the Richmond plan struck down in *Croson*: "However, the over-inclusiveness at issue in *Croson* is not present in our case, since Metro Dade is not offering

hiring preference to any groups, e.g., Aleuts or Eskimos, against which no discrimination has been found." *Id.* at 1409 n.37 (separate opinion of Judge Brown). In *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992), the Eighth Circuit found a remedial consent decree not over-inclusive because "the consent decree's interim and long-term goals applied only to blacks, the minority group identified as being underutilized." In *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990), the Tenth Circuit held that "[t]he purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination." And the Eleventh Circuit observed that

> the Richmond plan was not 'narrowly tailored' to remedy past discrimination in Richmond's construction industry because the set-aside requirement applied equally to African-Americans, Hispanics, Indians, Eskimos, and Asians, in spite of the fact that some of those groups were not represented in Richmond. The Richmond plan thus did more than remedy past discrimination, it benefitted groups against whom there may have been no discrimination.

Cone Corp. v. Hillsborough County, 908 F.2d 908, 917 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990). Similarly, this circuit, speaking through Judge Posner, has held that "*Croson* holds that the Equal Protection Clause forbids states and municipalities to discriminate in favor of blacks and other minorities unless the discrimination is necessary to rectify discrimination against the favored groups." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421 (7th Cir.), *cert. denied*, 111 S. Ct. 2261 (1991); *see id.* at 421-22 ("And a majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities,

unless the purpose is to provide a remedy for discrimination against the favored group.").[23] Thus, we conclude that *Croson* demands only that there be a showing of prior discrimination against the racial or ethnic *group* that benefits under the program, not the individual beneficiaries. As previously determined, in this case the City has justified its affirmative action promotions by demonstrating that the groups that benefitted—blacks and Hispanics within the CFD—were the victims of past discrimination.[24]

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[23] *But see Shurberg Broadcasting v. FCC*, 876 F.2d 902, 910 (D.C. Cir. 1989) (concurring opinion), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Winter Park Communications v. FCC*, 873 F.2d 347, 367-68 (D.C. Cir. 1989) (concurring opinion), *aff'd and remanded sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *see also Coral Constr. Co. v. King County*, 941 F.2d 910, 924 (9th Cir. 1991) (finding "case-by-case utilization goals" to be "less problematic" insofar as they "insure that the beneficiaries of such preferential treatment are those 'who truly have suffered the effects of prior discrimination'" (quoting *Croson*, 488 U.S. at 508)), *cert. denied*, 112 S. Ct. 875 (1992).

[24] Arguably, relief programs that only target individual victims of past discrimination do not employ racial classifications, do not discriminate among similarly-situated individuals based upon race, and thus are not truly "race-conscious." Such programs take race into account, if at all, only as a means of confirming victim status. Thus, if the *Croson* majority intended to restrict remedial programs to only those that benefit identifiable individual victims of past discrimination, it would be inconsistent with the Court's prior recognition of the need for "race-conscious" remedial relief in certain circumstances. *See Croson*, 488 U.S. at 518-19 (Kennedy, J., concurring in part and concurring in the judgment) ("The rule suggested in [Justice Scalia's] opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the need for courts to pass upon each racial preference that is enacted. . . . His opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race. Nevertheless, given that a rule of automatic invalidity for racial preferences would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point.")

Even if, as it is argued, *Croson* did require that an affirmative action program benefit only identifiable victims of the past discrimination it seeks to remedy, we would uphold the program under review in this case. We have already concluded that the City has provided substantial evidence that there was prior discrimination against blacks and Hispanics in the CFD's hiring and promotion procedures; from 1973 through 1980, the Justice Department challenged the CFD's hiring and promotion practices as discriminatory against blacks and Hispanics. Each beneficiary of the affirmative action promotions is employed within the ranks of the CFD, a specific, identified body infected by the ills of past discrimination. In 1987 there remained a significant statistical disparity between the ranks.[25] The minority membership of the lower ranks was still underrepresented in the upper ranks. Minority lieutenants still suffered the isolating effects of past discrimination, and, even if there was no barrier to entry at the firefighter level, minority firefighters still encountered the frustration of a discriminatory promotion system and of working under leadership that was the product of that system. Therefore, every one of the beneficiaries of the affirmative action practices challenged in *Billish* and *Chicago Fire Fighters* suffered at least the

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[25] According to Department of Labor work force participation figures, in 1980 the Chicago work force was 33% black and 13% Hispanic. R.71 (Chicago Fire Fighters) Joyce Aff. ¶ 15. As of June 30, 1987, the racial composition of the CFD was as follows:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	97	1	1	2.0%
Captain	194	5	2	3.6%
Lieutenant	646	68	20	13.6%
Engineer	464	44	7	11.0%
Firefighter	2739	638	161	29.2%

R.71 Stensland Aff. ¶ 19.

general effects of the past discrimination that the CFD was seeking to remedy.

More specifically, the evidence suggests that the beneficiaries of these programs suffered particular effects of past discrimination in CFD hiring and promotion. The beneficiaries of the practices challenged in *Chicago Fire Fighters* were a group of black firefighters who were promoted to engineer before the plaintiff firefighters, and one Hispanic lieutenant who was promoted to captain before the plaintiff lieutenants. All of the beneficiaries were promoted out of rank order.

With respect to the black firefighters, they had ranked lower than the white firefighters on the 1986 engineer eligibility list because of their performance on the 1985 engineer examination. The district court found that this examination was discriminatory insofar as it "had an adverse impact on minority candidates when used as a rank order device." 736 F. Supp. at 931. As discussed above, *see supra* pp. 30-34 [46a-51a], there was substantial evidence to support the district court's finding. Thus, the black firefighters who were beneficiaries of the affirmative action plan were not only general victims of past discrimination, they were specific victims of the adverse impact of the 1985 engineer examination.

With regard to the Hispanic lieutenant, he was promoted from the 1987 captain eligibility list out of rank order. This list was compiled from results of the 1986-87 captain examination which, unlike the 1985 engineer examination, was adjusted to dissipate any adverse impact. Thus, the Hispanic lieutenant cannot claim to be a victim of any discriminatory impact of the 1986-87 captain examination. Nevertheless, the evidence suggests that the Hispanic lieutenant was a victim of past discrimination in the 1978 promotion examinations. From the October 1, 1987, promotion order and the 1987 captain eligibility list, one can deduce the name of the Hispanic

lieutenant and the fact that he has served in the CFD since July, 1977. R.71 (Chicago Fire Fighters) Ex.N at 7, Ex.M at 1. In order to be promoted from firefighter to lieutenant, he had to take and pass a promotion exam for lieutenant [26] at some point between July 1977, when he was hired, and September 1987, when he sat for the first portion of the captain exam. His first opportunity would have been the 1978 set of promotion exams, which were discriminatory.[27] His next opportunity would not have been until after the engineer exam in 1985.[28] The first

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[26] Firefighters may become lieutenants directly—without spending time as an engineer.

[27] In 1978, the Department of Personnel prepared and administered new promotion exams for each rank in the CFD. R.71 (Chicago Fire Fighters) Cole Aff. at ¶ 11. In early 1980, the Justice Department advised the City that it intended to file suit to challenge the 1978 set of promotion exams "on the grounds that they had severe adverse impact against minority candidates." *Id.* at ¶ 13. After meetings between the Justice Department and the City, the attendees concluded that the exams had a severe adverse impact on minority candidates. Based upon the strength of the Justice Department's case, the projected cost to the City of defending the lawsuit, and the City's "belief that the promotion processes had been unfair to Black and Hispanic members of the Chicago Fire Department," the City decided to enter into the 1980 consent decree.

[28] Counsel for the City of Chicago told the district court that testing and listing are done from the bottom to the top: engineer first, lieutenant second, captain third, and battalion chief last. Counsel also told the district court that the 1985 test was the first engineer examination since 1978. Counsel said to the district court,

> It is true that the current generation of Fire Department lists, firefighter, engineer, lieutenant, captain, battalion chief stayed up a long number of years. They were—the lists were posted in 1979. I believe some of the tests were given in 1978.
>
> The engineer list was the first to go down. It went down with a new test in 1985. We've been working our way up the ladder. Engineer was first. Lieutenant was second. Captain third, and we'll be giving battalion chief tests. The reason that

promotions from the 1985 engineer eligibility list, which was produced by the 1985 engineer test, were not made until June 5, 1986 and the first promotions from the new lieutenant eligibility list could not have been any earlier.[29] The promotion orders from June 5, 1986 through September 1987 include only one set of promotions to lieutenant—the December 25, 1986 Personnel Order—and the Hispanic lieutenant at issue is not named on that order. R.71 (Chicago Fire Fighters) Ex.N at 2-3. Thus, from the evidence available in the record, it is reasonable to conclude that the Hispanic lieutenant must have taken the 1978 lieutenant exam and suffered its specific discriminatory effects: he was ranked lower on the 1979 lieutenant eligibility list than he would have been on a fair test. A lower rank meant a delayed promotion to lieutenant and less experience as a lieutenant before he took the 1986-87 captain exam. To the extent that the lack of experience translated into a poorer performance on the 1986-87 captain exam and thus a lower ranking on the 1987 captain eligibility list, the challenged action of promoting him to captain out of rank order provided a direct remedy of the effects of prior discrimination.[30]

Given this record, we agree with the district court that "there is no genuine issue of material fact that the City's

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this list—the length of time these lists have been up is out of the ordinary and not something the City intends to repeat.

Tr. of Oct. 14, 1987, R.171 (Billish) at 11-12. Thus, it appears that the next lieutenant exam was not until after the engineer exam was given in 1985.

[29] Compare the top scoring firefighters on the 1986 engineer eligibility list, R.71 (Chicago Fire Fighters) Ex.L, with the first firefighters promoted on June 5, 1986, R.71 (Chicago Fire Fighters) Ex.N.

[30] While the district court did not consider this method of handling the narrowly tailoring analysis, we note that "an appellate court may affirm on any ground that finds support in the record." *Roland v. Langlois*, 945 F.2d 956, 962 n.11 (7th Cir. 1991).

affirmative action goals at issue here were narrowly tailored to their remedial purposes." *Chicago Fire Fighters,* 736 F. Supp. at 933. In sum, the City had a compelling governmental interest, justifying its affirmative action program, and the program was narowly tailored to accomplish its purpose.

C. *Billish v. City of Chicago*

1. Facts

The *Billish* case involves promotions from the 1979 captain eligibility list. As we already have noted, the City administered an examination for the rank of captain in the CFD during 1978-79. The examination consisted of a written test, an oral test, and an efficiency grade. Each of the three parts was graded separately, weighed, and averaged for a final score. In 1979, the City posted the results of the exam and listed the lieutenants in rank order on an eligibility list. Each of the plaintiffs passed the examination and was ranked between numbers 245 and 281.[31] The City began making promotions from the eligibility list in rank order. Of the 298 persons who scored above the passing score of 70, 13 were minorities. Shortly after the posting of the eligibility list, the district court entered the 1980 settlement order, and the City and Union entered the CBA described previously.

In August 1983, Fire Commissioner Galante requested that a new examination be developed and administered for each of the ranks from firefighter to battalion chief because the 1979 eligibility lists were still in place. In March 1985, the last minority lieutenant was a score above 70 on the 1979 captain eligibility list was promoted. In the fall of 1986, the first part of a two-part captain examination was given. On December 25, 1986,

[31] The City maintains that the *Billish* plaintiffs scored from 239 to 281. In its answer to the plaintiffs' complaint, however, the City admits that the plaintiffs' rankings are correct. Therefore, we accept the plaintiffs' representations of their relevant scores.

before the City had completed administering the second part of the captain examination, Commissioner Galante issued a promotion order for several ranks of the CFD. The promotions were ordered to take effect January 16, 1987. Among those promoted were the eighteen remaining top-ranked persons on the 1979 captain eligibility list, each of whom was white. Commissioner Galante asked the Department of Personnel to identify any minorities that remained on the 1979 list. Deputy Commissioner of Personnel Robert Joyce reported that there were two minority lieutenants remaining on the list, but, because they had scored below the cut-off score of 70, the Personnel Department would have to lower the cut-off score to make them eligible for promotion. Precedent existed for such an action; passing scores for other ranks had been lowered. R.44 (Billish) Ex.A ¶ 6. Deputy Commissioner Joyce determined that the scores (64.17 and 56.69) and experience of the two minority lieutenants were sufficient to consider them qualified for promotion to captain. He testified that, because passing scores involved administrative factors such as the number of anticipated promotions, "failure to achieve the cut-off score does not mean that a candidate is necessarily unqualified for promotion." *Id.* ¶ 4. Accordingly, on January 12, 1987, Commissioner of Personnel Hoskins authorized lowering the cut-off score to make the two minority lieutenants eligible for promotion. On January 13, Commissioner Galante ordered the promotion of the two lieutenants effective January 16, the same date the December 25 promotions were effective.

By May 1987, the second half of the captain examination had been administered but the captain eligibility list had not yet been drawn up. Commissioner Galante needed five additional captains and inquired of Personnel Commissioner Hoskins when the new captain eligibility list would be ready. Commissioner Hoskins reported that the new list would be ready in approximately thirty to sixty days. Based on this report, Commissioner Galante decided to wait for the new list rather than draw from the

1979 list. On July 13, 1987, Commissioner Hoskins canceled the 1979 eligibility list and made the 1987 eligibility list effective. Each of the nine plaintiff lieutenants had passed the exam and were among those ranked on the list. On October 1, 1987, the first promotions from the 1987 list were made when twenty-four lieutenants were promoted to captain. These promotions included eighteen whites, five blacks, and one Hispanic. None of the plaintiffs—highest-ranking of whom was forty-first on the new list—was among the twenty-four promoted. The plaintiffs note, however, that, had the promotions come from the 1979 eligibility list, each of them would have been promoted.[32]

On October 7, 1987, the plaintiffs filed a two-count complaint, under 42 U.S.C. § 1983, against the City and Commissioner Galante. The plaintiffs challenged the lowering of those scores and the subsequent promotions, as well as Commissioner Galante's May 1987 refusal to draw

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[32] Soon after the City promoted the two minority lieutenants from the 1979 eligibility list, the Union filed a grievance. The Union alleged that the City breached the CBA by promoting the two minorities out of rank order and lowering their passing scores. The matter went to arbitration. The arbitrator determined that the City's motivation for promoting the two lieutenants was to comply with the affirmative action directives of the district court's 1980 settlement order as well as the affirmative action goals contained in the CBA. R.44 (Billish) Ex.B at 26-27. The arbitrator concluded that the City had met its "heavy burden" of justifying promotions out of rank order and lowering the passing scores. The arbitrator noted that the 1980 settlement order specifically authorized lowering the passing score for engineers and lieutenants. Moreover, both minority lieutenants were qualified in the arbitrator's view. From a contractual standpoint, the arbitrator determined that the CBA had not been violated by the promotions. He reasoned that the CBA explicitly grants to the City the unilateral right to make inherent managerial policy concerning minimum qualifications for all ranks. This unilateral authority, combined with the affirmative action mandate contained in the CBA, convinced the arbitrator that the City had the right to make the promotions. *Id.* at 30-31.

further from the 1979 captain eligibility list. Count I alleged that the promotions of the two minorities deprived the plaintiffs of their right to promotion to captain without due process of law. Count II alleged that the defendants refused to promote the plaintiffs solely because of race, in violation of the Equal Protection Clause. The City moved for summary judgment on both counts. In separate opinions, the district court granted both motions.

2. Due process claim

As the district court noted, a due process claim has two components: (1) the plaintiff had a protectible property interest, and (2) he was deprived of that interest without due process of law. Memorandum Opinion and Order of November 28, 1988 (R.46 (Billish)) at 6-7;[33] *see Perry v. Sindermann*, 408 U.S. 593, 599 (1972). To have a constitutionally protected property interest the plaintiffs "must have more than a unilateral expectation." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Instead, they must "have a legitimate claim of entitlement." *Id.* The Constitution does not create property interests; the plaintiffs must find their property interests in sources such as state law, existing rules, or mutual understandings. *Id.* "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Sindermann*, 408 U.S. at 601. As the district court also noted, the crux of the plaintiffs' argument is that they had a property interest in being promoted from the 1979 captain eligibility list based on the City's custom and practice of filling all vacancies before retiring an eligibility list and promoting individuals in rank order as vacancies occur. The court considered statutes, rules, ordinances, the City's Personnel Rules, and the CBA between the par-

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[33] *See Billish v. City of Chicago*, No. 87 C 8731, 1988 WL 130003 (N.D. Ill. Nov. 28, 1988).

ties, but found nothing to serve as a sufficient basis for a protected property interest.

On appeal, the plaintiffs draw our attention to the text of the CBA as the source of their property interest in rank-order promotion.[34] Specifically, the plaintiffs point to the language in Article IX, paragraph 9.3B(2)b, which provides: "No employee shall be promoted from a new promotion list until all employees who may have been passed over on a previous promotion order have been promoted." R.25 (Billish) Ex.D.[35] According to the

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[34] The City contends that the plaintiffs waived these arguments because they never presented them to the district court. As the district court explains, R.46 (Billish) at 1-4, the plaintiff's failure to present argument to the court was a result of the court's rejection of their late response to the motion for summary judgment. The district court did reach the merits, however, and it considered arguments for the plaintiffs' case which it extrapolated from the complaint. We therefore address these arguments on appeal.

[35] In full, section 9.3B reads:

> Section 9.3B Promotional Eligibility Lists
>
> 1. The ranking of employees on promotional lists shall be based upon the employee's ascertained merit which shall be determined by promotional examinations consisting of the following three criteria: written, seniority and oral proficiency.
>
> The weights to be accorded the criteria included herein shall be consistent with the requirements of Federal Law and shall be subject to review by the Justice Department.
>
> 2. Promotional vacancies shall be filled by the Commissioner from eligible employees certified from the applicable promotional eligibility list. Employees shall be certified for promotion in order of their rank on the list. The employees certified for promotion shall be the five employees having the highest scores (rank) for each position to be filled, but in no event more than fifteen employees more than the number of vacancies to be filled. Vacancies will customarily be filled by employees in the order of their ranking on the list. An employee certified for promotion to a vacancy may be passed over for any vacancy on an order subject to the following conditions:

plaintiffs, this agreement formalized a custom and practice of the City to promote in rank order. The district court reasoned that paragraph 9.3B(2)b did not apply because the plaintiffs were not "passed over" within the meaning of the paragraph. Relying on an arbitration decision that construed the paragraph, the court concluded that the plaintiffs' failure to be promoted from the 1979 eligibility list was not the equivalent of being "passed over." R.46 (Billish) at 9-10. The court also reasoned that an individual is passed over within the meaning of the paragraph when that individual "comes up for promotion but [was] not promoted for a particular reason, valid or otherwise." *Id.* at 10. In this case, the court continued, none of the plaintiffs came up for promotion, the entire 1979 eligibility list was canceled and everyone who wished to compete

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a. No employee may be passed over on more than two orders.

b. No employee shall be promoted from a new promotional list until all employees who may have been passed over on a previous promotional order have been promoted.

c. An employee may be passed over on an order only for the following reasons:

   i. At the time the vacancy occurs the employee is on an injury leave of six months or more for a non-duty related injury; provided, however, that upon the employee's return to duty from such leave he shall be promoted on the next order.

   ii. A major disciplinary infraction (i.e. charges re-resulting in a suspension of 15 days or more) ; provided, however, that if such disciplinary infraction is not sustained the employee shall be promoted on the next order. No disciplinary infraction may be used for more than one order as a reason to pass over an employee on a promotional order.

   iii. In order to comply with affirmative action ordered by a court.

The Employer shall specify the specific reason in the event that it decides to pass over an employee on an order.

R.71 (Chicago Fire Fighters) Ex.C. at 15-16.

for subsequent promotions was required to take the new captain examination. Furthermore, again relying on an arbitrator's interpretation, the court concluded that the plaintiffs were not "on an order" as that term is used in section 9.3B. *Id.* at 10-11. Our view of the arbitrator's decision confirms the district court's reasoning. Paragraph 9.3B(2)b applies only to individuals first certified for promotion and placed on a promotion list but later passed over. The plaintiffs were never certified for promotion or placed on a promotion list, therefore they are not "passed over" within the meaning of paragraph 9.3B(2)b.

Plaintiffs also point to the more general language in paragraph 9.3B(2), which states: "[Promotion] [v]acancies will customarily be filled by employees in the order of their ranking on the list." R.25 (Billish) Ex.D. As the district court noted, this general rule is qualified by the language which precedes it, and thus it is properly understood only in context:

> The employees certified for promotion shall be the five employees having the highest scores (rank) for each position to be filled, but in no event more than fifteen employees more than the number of vacancies to be filled. Vacancies will customarily be filled by employees in the order of their ranking on the list.

Id. This reflects the practice testified to by Deputy Commissioner Joyce: after the First Commissioner tells the Personnel Department that he would like to promote *x* number of lieutenants, the Personnel Department prepares and sends to the Commissioner a list of *x*-plus-five-to-fifteen names from which to choose. Plaintiff-Appellant's App. Ex.W at 27. Thus, the rule that "Vacancies will customarily be filled by employees in the order of their ranking on the list" refers to the list of names which the Personnel Department submits to the Fire Commissioner, not the eligibility list. Furthermore, paragraph 9.3B(2)c(ii) states three reasons an employee may be passed over:

c. An employee may be passed over on an order only for the following reasons:

i. At the time the vacancy occurs the employee is on an injury leave of six months or more for a non-duty related injury . . . .

ii. A major disciplinary infraction (i.e. charges resulting in a suspension of 15 days or more)

. . . .

iii. In order to comply with affirmative action ordered by a court.

Id. These exceptions provide the Fire Commissioner some non-rank-order flexibility in choosing from the list he receives from the Personnel Department. When the issue of the Commissioner's discretion was examined in arbitration, the arbitrator reviewed the history of section 9.3B. R.25 (Billish) Ex.B at 13-18. That history reveals the City's long-standing refusal to allow any limits on the Commissioner's discretion and its acceptance of section 9.3B only with the inclusion of the phrase "on an order," which the City understood to limit the Commissioner's discretion only after he drafted a promotion order. The arbitrator concluded that, despite the seemingly restrictive language of section 9.3B, the parties intended that "the Commissioner has at least a degree of discretion to choose from among the candidates listed on the certification list," although the Commissioner could promote out of rank order "only upon reasonable grounds." *Id.* at 41-43. The district court relied upon the arbitrator's findings when it concluded that "the Fire Commissioner has discretion to determine whether and when promotions should be made." R.46 (Billish) at 10-11. After reviewing the CBA and the arbitration opinions, we agree with the district court's conclusion that the Commissioner's discretionary latitude in non-rank-order promotion negates any property interest in

rank-order promotion. *See Stuart v. Roache,* 951 F.2d 446, 455 (1st Cir. 1991) ("[W]here an appointing authority may consider factors in addition to the applicants' ranking on an eligibility list, a police officer's expectation of promotion based on that list will not rise to the level of a 'property interest' entitled to constitutional protection."), *petition for cert. filed,* No. 91-1516 (Mar. 20, 1992).

Finally, the district court found no existence of a custom or practice by the City to fill vacancies for captain from the eligibity list in effect at the time a vacancy occurs. Relying in part on the plaintiffs' own depositions, the court concluded that there was no mutually explicit understanding between the City and the plaintiffs. Indeed, several of the plaintiffs were unable to point to a single instance when all vacancies were filled from an existing list. R.46 (Billish) at 14. Again, we are in agreement with the district court; there is no substantial evidence of such a custom or practice. Thus, we affirm the district court's dismissal of the due process claim; the plaintiffs have presented insufficient evidence to create a genuine issue as to the existence of a property interest in rank-order promotion.

3. Equal protection claim

The district court granted the City's motion for summary judgment on the equal protection claim in a separate opinion and order. Memorandum Opinion and Order of February 16, 1990 (R.60 (Billish)).[36] The court began its analysis by stating that the plaintiffs had the burden of showing that: (1) "the rationale for affirmative action is inadequate;" or that (2) "the specific actions unnecessarily trammel the legitimate interests of non-minorities." R.60 (Billish) at 2-3. Addressing the second prong first, the court concluded that the City could lawfully pursue a

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[36] *See Billish v. City of Chicago,* No. 87 C 8731, 1989 WL 182589 (N.D. Ill. Feb. 16, 1990).

course of affirmative action, and the course pursued in this case did not unnecessarily trammel the rights of the plaintiffs. The plaintiffs were not denied an opportunity to be considered for promotion, the court reasoned; in fact, each of the plaintiffs was on the 1987 eligibility list. Rather, the opportunity to be considered for promotion was simply postponed. *See id.* at 3-4. Furthermore, the court concluded that the plaintiffs could not prove that the City's rationale for the affirmative action was inadequate. The court noted the "significant disparities between minority availability and minority employment at all ranks," the "historical fact" that past hiring and promoting procedures had an adverse impact and were inadequately validated, the existence of prior racially discriminatory performance evaluations, and the DOJ's suit against the City and the ensuing 1980 settlement order. *Id.* at 5. These conditions corroborated the existence of a rational basis for the City's affirmative action. Relying on *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the district court declined to accept the plaintiffs' position that a formal finding of discrimination was required. R.60 (Billish) at 5. The court then held that no equal protection ground existed for challenging the City's decision to retire the 1979 eligibility list. "The City could reasonably conclude that the use of a stale list ought to be deferred where its use would perpetuate effects of past discrimination and increase racial disparities." *Id.* at 6. Finally, the district court distinguished the present case from *Croson* on the ground that, in this case, "the showing was made that the City discriminated against blacks in developing the 1979 list and the remedy neither involved arbitrary quotas nor excluded whites from advancement." R.60 (Billish) at 6 n.7.

The district court applied the wrong standard of scrutiny in its equal protection analysis. The court apparently relied upon an analytical framework which the Supreme Court prescribed for Title VII analysis in *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). As dis-

cussed earlier, a majority of justices in *Croson* held that, under the Equal Protection Clause, race-based remedial programs are subject to strict scrutiny; they must be justified by a compelling governmental interest and be narrowly tailored. *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality). For this reason, we must remand this case to the district court for reconsideration of the *Billish* plaintiffs' equal protection claim.

We acknowledge that there is some authority for simply applying the stricter standard of scrutiny to the record on appeal rather than remanding the case to the district court. *See Eisenbud v. Suffolk County*, 841 F.2d 42, 45-46 (2d Cir. 1988) (even though district court erred in applying rational basis standard, judgment affirmed under intermediate scrutiny); *cf. United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (applying narrow tailoring requirement despite lower courts' use of less rigorous standard, without deciding whether lower court had committed error). As this court has repeatedly stressed, "an appellate court may affirm on any ground that finds support in the record." *Roland v. Langlois*, 945 F.2d 956, 962 n.11 (7th Cir. 1991). We are also aware, however, that appellate courts are careful not to make such a determination if there is need for further analysis or supplementation of the record by the district court. *See, e.g., Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 971 (6th Cir. 1991) (reciting history of remand in light of *Croson*); *Evans v. City of Evanston*, 881 F.2d 382, 385 (7th Cir. 1989) (remanding for further analysis and/or supplementation of the record in light of *Wards Cove*). Here, we believe there are especially compelling reasons to defer to the district court for the initial reassessment. As we have already noted, *Croson* demands that, in cases involving affirmative action programs, courts undertake the narrow tailoring requirement of strict scrutiny analysis with extreme care. 488 U.S. at 493 ("searching judicial inquiry"), 507-511. Chief Judge Tjoflat acknowledged this directive when the

Eleventh Circuit was confronted recently with a similar situation:

> As Croson makes clear, equal protection challenges to affirmative action plans turn on detailed factual evaluations. We, as an appellate court, are ill equipped to make initial factual determinations. Therefore I think it best that we remand appellant's equal protection claim to the district court so that it may decide the merits of this claim. On remand, the district court, which previously resolved this case without the benefit of *Croson*, will be able to analyze the relevant facts extensively. In this way, we ensure that appellant's claim receives full and fair adjudication.

Peightal v. Metropolitan Dade County, 940 F.2d 1394, 1411 (11th Cir. 1991) (Tjoflat, C.J., concurring in part and dissenting in part), *cert. denied*, 112 S. Ct. 969 (1992). Moreover, upon examination of the record in this case, we have substantial misgivings as to whether it is sufficient to support the exacting degree of thorough analysis required by *Croson*. For example, we note that, in its presentation to us, the City has placed great emphasis on the immediate operational need for new captains as justifying the promotion of the two black lieutenants who scored below 70 on the 1979 exam and, in that regard, places great reliance on the deposition and affidavit of Commissioner Galante. However, on inspection, we believe that material leaves a significant question as to whether there was an immediate operational need for two more captains in January 1987. Read as a whole, Commissioner Galante's testimony appears to evidence concern more with immediate minority hiring than with meeting immediate operational needs.

On remand, the district court should reappraise the equal protection claim. Because the compelling governmental interest analysis will be, to a large extent, duplicative of our analysis in *Chicago Fire Fighters*, the prin-

cipal focus should be on whether the challenged actions were narrowly tailored. Given the exacting standard of *Croson,* the district court may well determine that augmentation of the record is appropriate.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court in *Chicago Fire Fighters* (No. 90-2182). In *Billish* (No. 90-1650), we affirm the district court's grant of summary judgment on the due process claim, but reverse and remand the disposition of the equal protection claim for further consideration in conformity with this opinion. The Defendants-Appellees in No. 90-2182 may recover their costs in this court. The Plaintiffs-Appellants in No. 90-1650 may recover their costs.

No. 90-2182—AFFIRMED

No. 90-1650—AFFIRMED in part,
REVERSED and
REMANDED in part

POSNER, *Circuit Judge*, dissenting. The Supreme Court has told us to take state discrimination against as well as in favor of whites with utmost seriousness. Noble intentions—vague gestures at history—the soothing assonance of "affirmative action—are none of them enough. We may permit reverse discrimination only when it is shown to be necessary to rectify past discrimination against nonwhites by the state or city or other state agency that wants to practice reverse discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). This directive precludes our affirming in No. 90-2182 (*Chicago Fire Fighters Union, Local No. 2 v. Daley*), where the district court held that white firemen passed over for promotion had failed even to raise a triable issue of unlawful discrimination. They did that and more. The other case, *Billish v. City of Chicago*, No. 90-1650, is materially identical, and I shall not discuss it separately beyond noting that while I agree that the decision must be reversed, I disagree with the ground. The problem is not that the district judge applied the wrong standard on summary judgment and should be told to apply the right one, but that the plaintiffs were denied the trial that the correct standard clearly entitles them to.

I admire the thoroughness of the majority opinion but there is a danger of missing the forest for the trees. The essential facts bearing on No. 90-2182 are few and simple. The Department of Justice sued the City in the 1970s, charging that the fire department discriminated against blacks. The suit was settled by the entry of a consent decree in 1980 that required the City to strive to promote minority (i.e., black and Hispanic) firemen to the ranks of engineer and lieutenant in a ratio of 1 minority fireman to 4 white ones. The plaintiffs in our case were not parties to the consent decree and are not bound by it. On the basis of exams given in 1985 and 1986, eligible candidates were ranked and in 1987 the fire chief promoted 80 firemen to either engineer (from

firefighter, the lowest rank) or captain (from lieutenant, the rank in between engineer and captain), of whom 23 were black or Hispanic. Nine of the 23 were promoted out of rank order. That is, they were promoted in place of nine whites who had higher scores on the pertinent exam.

They were promoted only because of their racial (or, in the case of Hispanics, ethnic) identity, and this is racial discrimination. It would be permissible discrimination if, but for discrimination *against* these groups, they would have accounted for 29 percent of the promotions (23 divided by 80) rather than the 18 percent (14 divided by 80) that they would have accounted for had the promotions been made on a nondiscriminatory basis. The majority is impressed by the fact that while 29 percent of the firefighters (the lowest rank) were either black or Hispanic, only 11 percent of the engineers, 14 percent of the lieutenants, and 4 percent of the captains were. But no inference of discrimination can be drawn from these statistics. If the number of black and Hispanic firefighters had been growing relative to the number of white firefighters, as in fact it had been—the percentage of firefighters who were black or Hispanic had doubled since 1983—one would expect them to be underrepresented in the higher ranks, since there is a waiting period before one is eligible for promotion to those ranks.

If minority firemen had been held back by discriminatory (or perhaps even just excessively long) waiting periods or racially discriminatory tests, or if their original entry into the fire department had been delayed because of racial discrimination, so that they were lower on the career ladder than they would have been had the City never discriminated, the City would be free to depart from the rank order generated by the test results in order to correct the consequences of discrimination by putting things approximately where they would have been but for

discrimination. But there is no evidence of promotion delays or other career delays due to discrimination, or of discriminatory exams. The exams given in 1985 and 1986 had been adopted by agreement between the minority firemen and the City—which by that time had a black mayor whose subordinates discriminated against whites. *Auriemma v. Rice,* 910 F.2d 1449, 1451 (7th Cir. 1990) (en banc); *Cygnar v. City of Chicago,* 865 F.2d 827, 835 (7th Cir. 1989); *United States v. City of Chicago,* 870 F.2d 1256, 1257-58 (7th Cir. 1989); *United States v. City of Chicago,* 894 F.2d 943, 949 (7th Cir. 1990) (concurring opinion). It is implausible either that the City would have demanded exams that discriminated against blacks and Hispanics because it was the—now merely nominal—defendant in the consent proceeding or that the minority firemen would have knuckled under to such a demand.

So the fact that blacks and Hispanics didn't do as well as whites on the engineers' exam—44 percent of the white firefighters who took the exam passed, compared to 32 percent of the blacks and Hispanics—is hardly evidence of persisting discrimination that might warrant remedial action. On the contrary, the exam results supply a noninvidious reason why there is a smaller fraction of black and Hispanic engineers than of black and Hispanic firefighters: the blacks and Hispanics didn't do as well as the whites on a fair test. They would have done even worse had not a portion of the exam been "race normed," meaning that the scores of the blacks and Hispanics were raised in order to reduce the disparity in the pass rate between them and the whites. Race norming has since been outlawed by the Civil Rights Act of 1991. Pub. L. No. 166, 102d Cong., 2d Sess., § 106, 105 Stat. 1071, amending 42 U.S.C. § 2000e-2.

All this said, the City might be able to prove in a trial that it had to alter the test scores and even depart from the rank order based on those altered scores in order to

put blacks and Hispanics where they would have been had there not been discrimination against them twenty years ago and more. I agree that there is adequate reason to believe there was discrimination back then even though there is no actual finding to that effect in any judicial decision; and the effects of that discrimination might have persisted into the 1980s by causing career delays. And there is nothing sacrosanct about tests or test scores. But the record compiled in the summary judgment proceedings does not allow us to conclude with anything like the certitude required to justify a grant of summary judgment that the racial and ethnic discrimination committed by the City against white firemen was justified within the narrow confines authorized by the *Croson* decision: fails to establish, that is, either that the discrimination against blacks and Hispanics did persist, or that the measures taken by the City are necessary to correct persisting effects. So far as the record shows, none of the minority firemen promoted out of order has ever been harmed, at least so far as his career in the fire department is concerned, by his racial or ethnic identity. I do not suggest that such evidence is necessary, although it would surely be sufficient. The City is entitled to take "action to rectify the effects of identified discrimination within its jurisdiction," *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 509; see also *Milwaukee County Pavers Ass'n v. Fiedler,* 922 F.2d 419, 421 (7th Cir. 1991). This dispensation would mean little as a practical matter if the City had to prove that the persons benefited by affirmative action had in fact been harmed by discrimination. But to repeat a tedious but essential refrain, so far as the record shows, by 1987 the effects of past discrimination by the Chicago Fire Department had completely dissipated, and the favoritism challenged in this case was pure racial politics. Maybe not, but to conclude not we need a trial. To suggest that these issues can be concluded by reading the papers submitted with a motion for summary

judgment is to fail to take seriously the Supreme Court's instruction to take reverse discrimination seriously.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 7295

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Plaintiffs,

v.

HAROLD WASHINGTON, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

In this case white members of the Chicago Fire Department ("CFD") bring claims under 42 U.S.C. Sections 1981 and 1983 alleging that the CFD's promotional decisions subjected them to reverse discrimination in violation of the Equal Protection Clause. Plaintiffs Chicago Fire Fighters Union Local No. 2 and some of its white members, and defendants City of Chicago and some of its officers, both have moved for summary judgment.

Our Seventh Circuit Court of Appeals recently agreed with a fellow judge in this district that "[n]o area of constitutional law has been more unsettled than that gathered under the rubric of 'affirmative action.'" *Cygnar v. City of Chicago,* 865 F.2d 827, 843 (7th Cir. 1989) *quoting Cygnar v. City of Chicago,* 652 F. Supp. 287, 297 (N.D. Ill. 1986) (Shadur, J.). This court has found the Supreme Court's affirmative action jurisprudence equally abstruse. Although rarely easy to apply, nonetheless, careful consideration of the Court's affirmative action princi-

ples compels this court to grant defendants' motion for summary judgment.

I. BACKGROUND FACTS

The uniformed, non-exempt fire suppression ranks of the CFD include, in ascending order of promotion, the following: Firefighter, Engineer, Lieutenant, Captain, and Battalion Chief. (Defendants' 12[l] Statement at ¶¶ 4-5; [1] Strensland Aff. ¶ 5.)

Plaintiff Chicago Fire Fighters Union Local No. 2 ("Union") is the collective bargaining representative for certain uniformed personnel of the CFD. The individual plaintiffs are white members of the CFD who held the rank of Firefighter or Lieutenant. In their first amended complaint [2] plaintiffs allege that defendants, the City of Chicago ("City") and some of its officers,[3] discriminated against them on the basis of race by making certain non-rank-order ("NRO") promotions.

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[1] In moving for summary judgment defendants, in compliance with Local Rule 12(l), filed a statement of material facts as to which defendants contend there is no genuine issue and that entitle them to judgment as a matter of law. Plaintiffs, however, failed to respond to defendants' statement as required by Local Rule 12(m). Instead, plaintiffs filed only a 12(l) statement in support of their own motion for summary judgment—a statement which in this instance does not comply with the requirements of Rule 12(m). Therefore, as required by Rule 12(m) all material facts set forth in defendants' 12(l) statement will be deemed to be admitted. Local Rule 12(m); *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990).

[2] On August 25, 1988 plaintiffs filed a Second Amendment to the Complaint, substituting new language for four paragraphs of the first amended complaint.

[3] Namely, defendant Harold Washington, the late mayor of the City, and Louis Galante and Jesse Hoskins, the Fire Commissioner of the CFD and the Commissioner of the Department of Personnel of the City, respectively. Plaintiffs bring suit against these individual defendants both in their official and individual capacities.

Plaintiffs make two claims. In Count I of the complaint the Firefighter plaintiffs allege that the defendants' policy of NRO promotions prevented them from being promoted to the next highest rank—Fire Engineer. In Count II the Lieutenant plaintiffs aver that the defendants' conduct precluded them from being promoted to their next highest rank—Fire Captain.

On January 19, 1985 the City, under the auspices of the CFD and the Department of Personnel, administered a two-part Fire Engineer's examination. 1,035 Firefighters interested in promotion to Engineer took the first part of the Engineer's examination—a written test. The Firefighters passing the written test were then given a practical "hands-on" test, or "simulator" test. Based on the results of this simulator test defendants posted the Engineer Promotional List, a list which ranked each Firefighter in accordance with the score achieved on the simulator test.

In a similar fashion, in September of 1986 the City also administered a two-part promotional examination for Fire Captain. 534 Fire Lieutenants completed the written portion of the examination, and about 506 subsequently completed an oral portion. Again, based upon the results of these tests defendants posted a Captain Promotional List, a list which ranked the Lieutenants based upon their scores on the examination.

Plaintiffs object neither to the examinations they took nor to the promotional rosters derived therefrom. On the contrary, plaintiffs contend that both the Engineer and the Captain examinations were carefully scrutinized to assure their validity as a promotional device. What plaintiffs protest is defendants' decision to make NRO promotions based upon race.

The NRO promotions at issue occurred for promotion both to Fire Engineer and Fire Captain. In June of 1987 Jesse Hoskins, the City's Commissioner of Person-

nel, informed Louis Galante, CFD Commissioner, that the third set of promtions from the Engineer Promotional List 'should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and additional 5% of those promoted would be Hispanic." (Defendants' Exhibit E.) On August 6, 1987 defendants issued an order certifying 56 Firefighters for the rank of Engineer. Eight Firefighters waived or otherwise declined promotion to Engineer, leaving 48 Firefighters identified for promotion. Pursuant to Commissioner Hoskins' directive the last eight Firefighters identified in the promotion order, all of whom were black, were promoted out of rank order—that is, were lower in rank on the Engineer Promotional List than the Firefighter plaintiffs.

Likewise, in July of 1987 Commissioner Hoskins informed CFD Commissioner Galante that promotions from the Captain Promotional List should be made with the goal of promoting 20% black and 5% Hispanic candidates. (Defendants' Exhibit F.) On October 1, 1987 defendants issued an order certifying 24 Lieutenants for the rank of Captain. The first 23 Lieutenants named to the rank of Captain were in rank order from the Captain Promotional List. The last Lieutenant, however, an Hispanic-American, was promoted out of rank order—*viz,* was lower in rank on the Captain Promotional List than the two Lieutenant plaintiffs.

Plaintiffs brought this suit under 42 U.S.C. Sections 1981 and 1983, alleging that the NRO promotions violated the Equal Protection Clause.

II. DISCUSSION

Because the court considers this case on cross motions for summary judgment, neither party can prevail unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any ma-

terial fact and that the moving party is entitled to a judgment as a mater of law." Fed. R. Civ. P. 56(c). In ruling on these cross motions for summary judgment the court must believe the evidence of the non-movant, drawing all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).

When confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). The party must do more than simply "show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.*, 475 U.S. at 587, 106 S. Ct. at 1356.

A. *Plaintiffs' Equal Protection Claim*

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." To determine whether the City's affirmative action policy at issue violates the Equal Protection Clause this court must subject it to "strict scrutiny." *City of Richmond v. Croson*, 468 U.S. 469, 109 S. Ct. 706, 721 (1989). To survive this heightened scrutiny the policy must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest. *Id.*

1. *Justification by a Compelling Governmental Interest*

To survive the first prong of the strict scrutiny test the City's affirmative action policy must be justified by a compelling interest. Clearly, the City would have a compelling interest in remedying past (and present) racial discrimination in making promotional decisions at the CFD—which is precisely the interest which defendants assert. *Croson*, 109 S. Ct. at 720; *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053, 1065 (1987); *Wygant v. Jackson Board of Education*, 478 U.S. 267, 106 S. Ct. 1842, 1853 (1986) (O'Connor, J., concurring).

The Court has made clear that a "contemporaneous or antecedent finding of past discrimination by a court or other competent body is *not* a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action program." *Wygant*, 476 U.S. at 189, 106 S. Ct. at 1855 (O'Connor, J. concurring) (emphasis added). However, the Court has insisted upon "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1847 (plurality).

In *City of Richmond v. Croson*, 468 U.S. 469, 109 S. Ct. 706, 721 (1989), the Court clarified the showing that defendants must make in order to justify remedial relief. The Court held that a district court must make a factual determination that a governmental body had a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 109 S. Ct. at 724, 730, *quoting Wygant*, 476 U.S. at 277, 106 S. Ct. at 1848 (plurality). Only then would the governmental entity have a compelling interest in favoring one race over another. *Croson*, 109 S. Ct. at 723.

Although the defendants in this case must present a strong basis for concluding that remedial action was ap-

propriate, the ultimate burden nonetheless remains with the plaintiffs to demonstrate the unconstitutionality of the NRO promotions—that the defendants' evidence failed to support an inference of prior discrimination or that the remedial relief chosen was not "narrowly tailored" to its purpose. *Wygant,* 476 U.S. at 277-78, 293, 106 S. Ct. at 1849, 1857.

In making their showing defendants cannot rely solely upon a generalized assertion that there has been past discrimination in the CFD, as this would provide no guidance for the department to determine the precise scope of the injury it seeks to remedy and thus would be insufficient to justify the affirmative action at issue. *Croson,* 109 S. Ct. at 723-4. Defendants rely upon four bases to justify their affirmative action policy: (1) the obligations of a previous order of settlement and the history of litigation that produced it; (2) the City's contract with the Union requiring the CFD to reach as quickly as is reasonably possible a level as close to 45% minority representation in each rank of the CFD as is "reasonably achievable"; (3) the disparities between minority representation in the Engineer and Captain ranks and representation in the ranks immediately below them; and (4) the discriminatory adverse impact of the Engineer examination on minorities.

a. *The McGarr Order* [4]

In 1973 the United States Department of Justice brought suit against the City of Chicago alleging that the hiring and promotion practices of the CFD unlawfully discriminated against blacks and Hispanics. (Cole Aff. ¶ 5.) At that time less than 5% of the uniformed per-

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[4] As plaintiffs correctly note, the Order entered by Judge McGarr of this District does not bar this action because plaintiffs did not in any way join in that agreement. *Martin v. Wilks,* 109 S. Ct. 2180, 2188 (1989).

sonnel in the CFD were black or Hispanic. (Cole Aff. ¶ 6.)

The same year the suit was filed the Seventh Circuit Court of Appeals entered an injunction pending appeal against the City on the hiring issue. At that point, the City concluded that it would not be able to successfully defend against the Department of Justice's discriminatory hiring claims. Accordingly, the City entered into a consent decree which established an interim 50% minority (black and Hispanic) hiring ratio and a long range goal requiring the City to substantially increase the minority composition of the CFD. (Cole Aff. ¶ 7.)

Because little hiring took place between 1974 and 1978, the interim hiring goal established by the 1974 consent decree had a limited immediate effect in increasing the proportion of blacks and Hispanics in the CFD—by September 1978, the CFD contained 9% blacks and Hispanics. Thus, supplemental hiring orders were entered providing that additional hiring be done on the basis of a 50% minority ratio. (Cole Aff. ¶ 8; Defendants' Exhibit A.)

With respect to the issue of promotions, the Justice Department challenged as discriminatory the promotional examinations and eligibility lists that had been used in the 1960's and early 1970's. (Cole Aff. ¶ 9.) Although the district court ruled in the City's favor, the Court of Appeals reversed and remanded for further proceedings. (Cole Aff. ¶ 10.)

In 1978, prior to the completion of the remand proceedings, the City's Department of Personnel prepared and administered new promotional examinations for each rank in the CFD. (Cole Aff. ¶ 11.) In early 1980 the Department of Justice advised the City that it intended to file a new lawsuit challenging all four of the newly administered promotional examinations on the grounds that they had a severe adverse impact against minority candidates. (Cole Aff. ¶ 13.)

In response to this latest lawsuit representatives of the CFD, the City's Department of Personnel and the City's Law Department convened a series of meetings to analyze the strengths and weaknesses of the Justice Department's case. Those taking part in that meeting concluded that the examinations had a severe adverse impact on minority candidates, that the examinations had not been adequately validated, especially not for use in ranking candidates, and that the efficiency ratings (one of the components of a candidate's final score) were racially discriminatory. (Cole Aff. ¶ 14.)

Based upon this assessment, the high costs of litigation, and a belief that the promotion process had been unfair to black and Hispanic members of the CFD, the City decided to settle the lawsuit with the Justice Department. (Cole Aff. ¶ 15.) The resulting settlement agreement established a 1-to-4 minority/white promotion ratio as an interim requirement for promotions to the ranks of Lieutenant and Engineer until new, validated promotional examinations could be administered and new promotional lists posted. Additionally, the agreement initiated a long-term promotional goal which would require the City to substantially increase minority participation at each rank of the CFD so that the minority composition of each rank would mirror the racial composition of the preceding rank. (Cole Aff. ¶ 16.)

This settlement agreement was approved by the district court, Honorable Frank J. McGarr, and incorporated into an Order of Settlement entered March 31, 1980 ("McGarr Order"). (Cole Aff. ¶ 17.) The McGarr Order states that "defendants, as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks [of the CFD] with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made." (McGarr Order at 2-3, Defendants' Exhibit B.)

Defendants "technically admit" that no formal findings of discrimination were made in the course of either of the two lawsuits which ultimately were resolved by the McGarr Order. (Defendant's 12[m] Statement at ¶ 1.) Indeed, because it reflected settlement of the Justice Department's latest suit against the City, the McGarr Order itself makes no formal finding of past discrimination. Moreover, as plaintiffs aptly point out, in accepting the terms of a consent decree "the parties are free to agree on relief more extensive than federal law requires." *Kasper v. Board of Election Commissioners,* 814 F.2d 332, 338 (7th Cir. 1987). Therefore, while the consent decree itself may be consistent with the Constitution and laws, any affirmative action plan promulgated pursuant to it may not necessarily be. *See U.S. v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989).

Nonetheless, in an attempt to present a formal finding of past discrimination defendants cite the Seventh Circuit's reversal and remand of an earlier district court finding of non-discrimination. (Defendant's 12[m] Statement at ¶ 1.) In *United States v. City of Chicago,* 573 F.2d 416 (7th Cir. 1978), the Seventh Circuit enjoined permanent promotions based on the 1969 Engineer's, 1970 Lieutenant's, and 1973 Captain's examinations unless such promotions first were offered to minority candidates on the respective lists. 573 F.2d at 429. In providing injunctive relief the court must have believed that the Justice Department had a sufficient likelihood of succeeding on the merits in demonstrating that the promotional examinations at issue discriminated against blacks and Hispanics. *See, e.g., Helene Curtis Industries, Inc. v. Church & Dwight Co.,* 560 F.2d 1325, 1330 (7th Cir. 1977). Moreover, the district court had held that the Justice Department had made out a prima facie Title VII case of discrimination based upon the disparate impact of the Engineer, Lieutenant, and Captain exams—a holding which the Court of Appeals did not dispute *per se,* but simply remanded for specific findings of fact. 573 F.2d at 425.

These decisions indicate—without formally so holding—that the City most likely was faced with a prima facie case of racial discrimination. Nonetheless, it warrants reiteration that a formal judicial finding of past discrimination is not a constitutional prerequisite to voluntary agreement to an affirmative action program. *Wygant*, 476 U.S. at 189, 106 S. Ct. at 1855 (O'Connor, J. concurring). As Justice O'Connor cautioned:

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the voluntary efforts to further the objectives of the law."

Id., 476 U.S. at 290, 106 S. Ct. at 1855 (citations omitted).

Thus, although there exist no formal findings of past discrimination in the CFD, the litigation history of the CFD's past hiring and promotion practices offers at least some evidence of past discrimination. This evidence, when combined with other evidence provided by defendants (discussed below), constitutes a "strong basis" for the conclusion that remedial action was necessary. *Croson*, 109 S. Ct. at 730.

b. *The Collective Bargaining Agreement*

The defendants argue that the City's collective bargaining agreement with the Union offers additional support for the City's decision to engage in affirmative action in its promotion process. The union contract requires the City both to comply with decrees and agreements reached in court proceedings and also to have transfer and promotion policies with the goal of including blacks and His-

panics in all categories and ranks of the CFD to "reach as quickly as is reasonably possible a level as close to 45% as is reasonably achievable." (Union Contract, Appendix G, attached as Plaintiffs' Exhibit 3.) This same language has been in every contract between the City and the Union from 1980 to the present. (Stensland Aff. ¶ 12.)

The existence of an affirmative action goal in a collective bargaining agreement alone may not be sufficient to support a factual determination that the CFD had a "strong basis" for its conclusion that NRO promotions were necessary. Nonetheless, the affirmative action provisions of the Union's collective bargaining agreement corroborate other more direct evidence of past discrimination in the ranks of the CFD.

c. *Minority Underrepresentation Statistics*

Defendants' statistics reflecting minority underrepresentation in the ranks of the CFD provide the strongest evidence of past discrimination in the CFD.

The Court has held that a statistical imbalance sufficient for a Title VII prima facie case would satisfy the constitutional requirement that the City have a "strong basis" for believing that remedial action was required. *Croson,* 109 S. Ct. at 724; *Wygant,* 476 U.S. at 274-5, 106 S.Ct. at 1847 (plurality); *Johnson v. Transportation Agency, Santa Clara County, Cal.,* 480 U.S. 616, 107 S. Ct. 1442, 1461-2 (1987) (O'Connor, J., concurring in the judgment); *Hazelwood School District v. United States,* 433 U.S. 299, 307-308, 97 S. Ct. 2736, 2741 (1977) (where "gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII).

The parties to this case dispute whether the appropriate statistical comparisons here are between the percentage

of minorities in the relevant ranks of the CFD and the general labor population, or between the percentage of minorities in a particular rank of the CFD and the rank immediately below it. The latter comparison is correct.

As the Supreme Court has stated, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazelwood,* 433 U.S. at 308 n.13, 97 S. Ct. at 2742 n.13. Thus, where special qualifications are required the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be "the number of minorities qualified to undertake the particular task." *Croson,* 109 S. Ct. at 725.

In this case comparisons to the general labor population in Chicago are inappropriate. The relevant statistical pool for promotion to Engineer is the group of Firefighters, as all promotions are made from that group—the next lowest rank. Similarly, the qualified labor pool for promotion to Captain is the group of Lieutenants, because all promotions to Captain are made from that rank. If there is a significant statistical disparity between the number of qualified minority Firefighters willing and able to serve as Engineers and the number of minorities actually serving as Engineers, an "inference of discriminatory exclusion could arise." *Croson,* 109 S. Ct. at 729, *citing Bazemore v. Friday,* 478 U.S. 385, 398, 106 S. Ct. 3000, 3008 (1986) *and Teamsters v. United States,* 431 U.S. 324, 337-339, 97 S. Ct. 1843, 1856 (1977). A similar inference could arise by comparing the number of qualified minority Lieutenants willing and able to serve as Captains and the number of minorities actually serving as Captains.

It is undisputed that as of June 30, 1987 only 11.0% of the total CFD Engineers were black or Hispanic. However, blacks and Hispanics comprised 29.2% of the CFD's Firefighters. Similarly, although minorities comprised only

3.6% of the CFD's Captains, 13.6% of the CFD's Lieutenants were black or Hispanic. (Defendants' 12[l] Statement at ¶ 5, *citing* Stensland Aff. at ¶ 19.)

Without presenting any evidence to the contrary, plaintiffs merely assert that these figures are not statistically significant and thus fail to make out a prima facie case of racial discrimination. However, as defendants correctly note, a difference of greater than two or three standard deviations between the expected percentage and the observed percentage of minorities in a relevant labor pool can be sufficient to support an inference of discrimination. *See Hazelwood,* 433 U.S. at 308 n.14, 97 S. Ct. at 2742 n.14.

Defendants have presented uncontradicted evidence that in 1987 the difference between the expected percentage of blacks and Hispanics in the Engineer rank given the percentage in the Firefighter rank was 8.7 standard deviations—"well beyond the level of chance." (Joyce Supp. Aff. ¶ 4.) Similarly, the difference between the expected percentage of blacks and Hispanics in the Captain rank given the percentage in the Lieutenant rank was 3.96 standard deviations—again "well beyond the possible effect of chance." (Joyce Supp. Aff. ¶ 2.)

Likewise, defendants aptly point out that a showing that a disparity between the number of minorities in relevant labor pools is statistically significant at the .05 level—meaning that the odds are one in twenty that the result occurred by chance—is sufficient to support an inference of discrimination. *See Segar v. Smith*, 738 F.2d 1249, 1282-83 (D.C. Cir. 1984). Again, defendants have presented uncontradicted evidence that the disparity between the actual and expected number of minority Engineers given the racial composition of the Firefighter rank, and the disparity between the actual and expected number of minority Captains given the racial composition of the Lieutenant rank, is statistically significant well below the .05 level. (Joyce Supp. Aff. ¶¶ 3-4.)

It could be argued (but plaintiffs do not) that defendants' statistics are too simplistic, as they contain only one independent variable: race. *See Allen v. Seidman,* 881 F.2d 375, 378-80 (7th Cir. 1989). However, a simple statistical comparison can support a prima facie case of discrimination, especially when an opposing party fails to conduct a more sophisticated comparison. *Id.* at 380; *Regner v. City of Chicago,* 789 F.2d 534, 538 (7th Cir. 1986); *Aguilera v. Cook County Police & Corrections Merit Board,* 760 F.2d 844, 846 (7th Cir. 1985).

When confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial. *Celotex Corp. v. Catrett,* 477 U.S. at 324, 106 S. Ct. at 2553. Plaintiffs have failed to do this with regard to defendants' statistical evidence of minority underrepresentation in the relevant ranks of the CFD. Thus, this court accepts and finds compelling defendants' statistical evidence of past discrimination in the CFD.

d. *Evidence of Adverse Impact of the Engineer Examination on Minorities*

Finally, to show that they had a compelling interest in instituting affirmative action promotions defendants present evidence that the 1985 Engineer examination had an adverse impact on minority candidates when used as a rank order device.

It is clear that a prima facie case of racial discrimination may be established by showing that a particular examination has an adverse racial impact on minority candidates. *See, e.g., Bushey v. N.Y. State Civil Service Commission,* 733 F.2d 220, 224-25 (2d Cir. 1984). A plaintiff seeking to make out a prima facie case typically applies to test results the "four-fifths" rule of the Equal

Employment Opportunity Commission's Uniform Guidelines on Employment Selection, 29 C.F.R. § 1604.4(D).[5] *Id.* at 225-26.

Defendants in this case admit that neither the simulator portion of the Engineer examination nor either portion of the Captain examination had an overall adverse impact upon minority candidates. (Defendants' 12[m] Statement at ¶¶ 10, 13; Joyce Aff. at 126-27.) They present uncontradicted evidence, however, that starting with the third promotion to Engineer from the 1986 Engineer eligibility list the minority success rate of promotion was less than 80% of the white success rate of promotion, and thus under the "four-fifths" rule the Engineer examination had an adverse impact on minority candidates when used as a rank order device. (Joyce Aff. at ¶ 10.)

Defendants go on to note that if a selection device has more of an adverse impact when used for a ranking device than it does otherwise (e.g. on a pass/fail basis), then it must be validated specifically for use in rank order selection. (Defendants' Mem. in Support at 19-20; Requests to Admit and Plaintiffs' Responses to Requests for Admission, Exhibit O at ¶ 2.) Defendants then present expert evidence that the Engineer examination was not and could not have been validated for making rank order promotions. (Barrett Aff. at ¶ 17.)

Plaintiffs assert, however, that there is a genuine issue of material fact as to whether the Engineer examination was validated for use as a rank order device. Plaintiffs cite the deposition of Robert T. Joyce, the City's Deputy Commissioner of Personnel, who stated, based upon a

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[5] 29 C.F.R. § 1607.4(D) provides in relevant part: "A selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."

pilot study, that "we felt that [the simulator portion of the Engineer examination] could be satisfactorily used as a ranking device." (Joyce Dep. at 48.)

Mr. Joyce's testimony must be viewed in its entirety, however. Later, when asked specifically whether the Engineer's examination in fact even had been validated for the purpose of rank order assignments, Mr. Joyce responded "no." (Joyce Dep. at 246.) Indeed, corroborating defendants' expert, Mr. Joyce unequivocally stated that the Engineer examination was not and, given the circumstances faced by the City, could not have been validated for making rank order assignments. (Joyce Dep. at 246; Barrett Aff. at ¶ 17; *see also* Shepherd Dep. at 290-91.)

Thus, there is no genuine issue of material fact that at least the Engineer examination had an adverse impact on minority candidates when used as a rank order device and was not (and could not have been) validated for rank order use. The adverse impact of the Engineer examination further convinces this court that the defendants have sufficiently demonstrated a compelling interest justifying affirmative action promotions.

In summary, then, based upon the litigation history of the CFD's past hiring and promotion practices, the affirmative action provisions of the collective bargaining agreement between the City and the Union, the significant disparities between minority representation in the Engineer and Captain ranks and representation in the ranks immediately below them, and the discriminatory adverse impact of the Engineer examination on minorities, this court concludes that there is no genuine issue of material fact that the City had a strong basis in evidence for its conclusion that its affirmative actions promotions were necessary.

2. *Narrowly Tailored To Accomplish a Remedial Purpose*

However, not only must there be no genuine issue of material fact that plaintiffs had a compelling interest requiring remedial measures, but also the remedy chosen must be narrowly tailored to accomplish its purpose. *Croson,* 109 S. Ct. at 721.

In determining whether the City's affirmative action goals are appropriate this court must look to several factors, including:

> the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 107 S. Ct. at 1067. Careful scrutiny of these factors confirms that the City's policy of affirmative action promotions was narrowly tailored to serve its remedial ends.

First, given the City's compelling interest in remedying past discrimination the necessity for relief in this case is great. Moreover, the City determined that "no other approach [other than NRO promotions] would permit meaningful affirmative action progress." (*See* Defendants' Exhibits E and F.) Indeed, as defendants correctly note, since promotions to the ranks of Engineer and Captain could only be made from the ranks below them, a race-neutral method for expanding minority representation in the upper ranks, such as aggressive recruitment, was not possible.

Second, the City's affirmative action goals are sufficiently flexible and limited in duration. The plaintiffs repeatedly characterize the City's affirmative action plan as a 25% "set-aside" for minorities. (*See, e.g.,* Plaintiffs' 12[l] Statement at ¶¶ 15-16.) However, as defendants

aptly point out, this characterization is not supported by the evidence. (*Compare* Hoskins Tr. at 31-33, cited by plaintiffs, *to* Defendants' Exhibits E and F.) In fact, it is clear that the affirmative action program at issue consists of a policy, promulgated in mid-1987, under which promotions to the ranks of Captain and Engineer would be made with the "goal" of having 20% offered to black candidates and 5% to Hispanic candidates. (Defendant's Exhibits E and F; Hoskins Dep. at 7.)

By definition, a goal for minority representation is more flexible than an unyielding quota. Moreover, under this particular goal no unqualified black or Hispanic candidate need be offered a promotion. On the contrary, there is no dispute that the black and Hispanic candidates promoted ahead of plaintiffs—all of whom successfully completed their respective examinations—were fully qualified for promotion. (Joyce Aff. ¶¶ 12-13.) In fact, plaintiffs themselves allege that the promotional examinations for the ranks of Engineer and Captain are valid measures of the qualifications for candidates to those ranks. (First Amended Complaint, ¶¶ 12, 27.)

It also is uncontested that the City's affirmative action goals are of limited duration—applied for only three years or until a specified number of promotions have been made from the promotional lists at issue. Moreover, "to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action promotional goals will be reevaluated on an annual basis." (Defendant's Exhibit E at 4-5, Exhibit F at 4-5.)

Third, given the disparity between minority representation in the Engineer and Captain ranks and representation in the ranks immediately below them, the City's numerical goals are sufficiently related to the relevant labor market. This is especially true given that the City's stated policy is to review the goals annually to determine whether they are still necessary and appropriate; and in any event the City will eliminate the goals

after three years or after a certain number of promotions have been made under them.

Finally, the City's goals neither create a bar to white advancement nor excessively burden white candidates for promotion. Under the City's policy white candidates will continue to be promoted to the ranks of Engineer and Captain at high levels. Moreover, as the Court has stated, " '[d]enial of a future employment opportunity is not as intrusive as loss of an existing job,' . . . and plainly postponement imposes a lesser burden still." *Paradise*, 107 S. Ct. at 1073, *quoting Wygant*, 476 U.S. at 282-83, 106 S. Ct. at 1851 (plurality).

Thus, the court holds that there is no genuine issue of material fact that the City's affirmative action goals at issue here were narrowly tailored to their remedial purpose. Because this court finds that there can be no significant doubt both that the City's affirmative action goals were justified by a compelling governmental interest and also that the goals were narrowly tailored to serve that interest, summary judgment must be granted in favor of the defendants.

B. *Plaintiffs' Section 1981 Claim*

Apart from equal protection analysis, plaintiffs' Section 1981 claim is untenable for another reason. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Supreme Court recently addressed the issue of whether a promotion claim is actionable under Section 1981. The Court held:

> [T]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. . . . Only where the promotion rises to the level of an opportunity for a *new and distinct relation* be-

> tween the employee and the employer is such a claim actionable under § 1981.

109 S. Ct. at 2377 (emphasis added). *Patterson* requires this court to grant summary judgment in defendants' favor on plaintiffs' Section 1981 claims for two reasons.

First, plaintiffs' first amended complaint, filed and further amended before *Patterson* was decided, contains neither allegations nor facts indicating that promotion to the ranks of Engineer or Captain would result in a "new and distinct" relationship between the plaintiffs and the CFD.[6] Plaintiffs have failed to amend their complaint to allege such facts. This is fatal to their Section 1981 claims. *See Greggs v. Hillman Distributing Co.*, 719 F. Supp. 552, 555 (S.D. Tex. 1989).

Second, on summary judgment, plaintiffs—who of course bear the burden of proof on their Section 1981 claim—must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact in this case which requires trial. Plaintiffs have designated no facts whatsoever indicating that their promotions would have created a new and distinct relation with the CFD. Therefore, summary judgment must be entered against plaintiffs on the Section 1981 claims. *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S. Ct. at 2553.

C. *Qualified Immunity*

Finally, regardless of this court's ruling on equal protection liability, Louis T. Galante and Jesse Hoskins are entitled to qualified immunity from suit in this case.

Under the doctrine of qualified immunity public officials "performing discretionary functions are protected against suits for damages unless their conduct violates

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[6] *See* Second Amendment to the Complaint, filed August 25, 1988.

clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbitt,* 881 F.2d 510, 511 (7th Cir. 1989). Commissioners Galante and Hoskins allegedly were involved with the decision to institute the affirmative action goals at issue as of the middle of 1987. (*See* Defendants' Exhibits E and F.) At that time (as now) the most recent Supreme Court decisions upheld affirmative action plans which were narrowly tailored to serve proper remedial purposes. *See, e.g., Paradise,* 107 S. Ct. at 1074 (1987).

As discussed above, when the City instituted its affirmative action goals: (1) the City was bound by the McGarr Order to "promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks of the Chicago Fire Department"; (2) the City had a collective bargaining agreement with the Union setting a goal of 45% minority representation throughout the CFD; and (3) there was a significant statistical disparity between the proportion of minority members in the Engineer and the Captain ranks of the CFD compared to the proportion in the ranks immediately below them.

Moreover, also as discussed above, the City affirmative action plan created the "goal" that 20% of promotions to Engineer and Captain be given to black candidates and 5% to Hispanic candidates. The goal was to be of limited duration. Moreover, no unqualified black or Hispanic candidates would be offered NRO promotions.

Given these facts a reasonable fire commissioner or personnel commissioner could have concluded that he could take race into consideration for a limited reorganization of the Engineer and Captain rank of the CFD. *See Auriemma v. Rice,* 895 F.2d 338, 343-44 (7th Cir. 1990); *Cygnar,* 865 F.2d at 844.

III. CONCLUSION

Because the pleadings, deposition testimony, answers to interrogatories, and affidavits show that there is no genuine issue as to any material fact in this case and that the defendants are entitled to a judgment as a matter of law, defendants' motion for summary judgment is GRANTED. This case is dismissed in its entirety.

ENTER:

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

Dated: May 7, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 8731

HONORABLE JAMES B. ZAGEL

EARL BILLISH, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This case presents a claim of reverse discrimination in violation of the equal protection clause. I have granted summary judgment for defendants on their due process claim in an opinion issued 28 November 1988. That opinion is appended here, and it recites the history and facts of the case.

The equal protection theory has changed over the course of the case. The claim began as a challenge to the defendants' action in January, 1987 in taking down (refusing to use) the 1979 fire department promotion list for Captain until the list was exhausted. The defendants so acted, said the plaintiffs, because every name on the list belonged to a white male. There is no dispute here that it was rational for defendants to retire a seven year old list. Indeed, it is hard to imagine a sound personnel management policy which would cause any public safety service to allow a list to be used for that long.

But the defendants left the promotion list in place.[1] Plaintiffs contended that the age of the list was not the reason for the defendants' refusal to use it. There was, however, no real evidence to support the plaintiffs' contention. So the claim has been changed.

Now in a revised theory plaintiffs say defendants denied them equal protection because defendants in January, 1987 (a) reached down below the set cut-off score for persons qualified for promotion solely to elevate two blacks to the rank of Captain and (b) then retired the list and refused to make further use of it, having exhausted from the 1979 list all non-whites.

The defendants do not dispute that the two blacks were promoted as a result of affirmative action taken on the basis of race. Such promotions do not violate equal protection even if some whites were hurt by them, if the affirmative action is properly justified and carried out. *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987). The plaintiffs here bear the burden of showing that the rationale for affirmative action is inadequate[2] *or* that the specific actions unnecessarily trammel the legitimate interests of non-minorities.[3]

There appears to be no hope that plaintiffs can prevail in proving unnecessary trammeling. Their interests are not great enough. What is at stake here is not promotion to Captain, but the right to be considered for promotion to Captain. Plaintiffs could (but do not) argue that actual promotion is at issue here because the two promotions

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[1] As they did the police sergeants' list. *United States v. City of Chicago*, —— F.2d —— (88-3301) (6 Feb. 1990).

[2] *United States v. Paradise*, 107 S. Ct. at 1064-66; *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1853-54 (1986) (O'Connor, J., concurring).

[3] *Wygant v. Jackson Board of Education*, 106 S. Ct. at 1850-51; *Johnson v. Transportation Agency*, 107 S. Ct. at 1455.

given to blacks would have been given to them. This would apply to only two plaintiffs. Or it could be argued that promotions would have gone to the next two persons on the rank order list. This argument helps only Dunne (who was promoted from the successor list) and not the other eight plaintiffs.

The denial of an opportunity to be considered for promotion, the harm caused plaintiffs here, is less than denial of employment or termination of employment. This distinction is recognized in law. *United States v. Paradise*, 107 S. Ct. at 1073. Indeed what occurred here was not even the denial of an opportunity to be considered for promotion, it was postponement of the opportunity. All plaintiffs may compete for promotion from the new Captain's list. There is no absolute bar here to advancement by white males. The defendants' actions were not more than required to meet affirmative action goals (whose achievement has yet to occur).[4] In short, if defendants could lawfully pursue a course of affirmative action then the course pursued here did not unnecessarily trammel the rights of plaintiffs.[5]

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[4] The City was not relentless in promoting minorities. Between January, 1987 (when the two blacks were promoted) and March, 1985, there were over fifty promotions to Captain. All promotees were white. Indeed from August, 1979 to June, 1987 minority representation in the rank of Captain was nearly halved.

[5] There are two side issues here regarding the qualifications of the black promotees.

(1) There is apparently no problem under the union agreements or state law with respect to the two promotions of blacks. Those acts were challenged in arbitration by the union and the Arbitrator found in favor of the City.

(2) The two blacks had scores below 70, the cut-off score usually used by the City. Plaintiffs say that the blacks were "unqualified" and thus promoted over "qualified" whites. There is no evidence to support the link between a score of 70 and qualification. The cut-off score is at a level needed to assume an adequate number to fill

Can the plaintiffs prove that the City's rationale for affirmative action is inadequate? The answer is no. There were and are significant disparities between minority availability and minority employment at all ranks in the Fire Department. This is true whether comparisons are made between external availability or internal availability of minorities.[6] There is the historical fact of the use of hiring and promotion procedures that had an adverse impact and were not adequately validated. Promotion procedures included racially discriminatory performance evaluations. Indeed the United States took the City to court over these matters. *See U.S. v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). The litigation ended in a consent decree. The binding nature of that decree on plaintiffs is subject to question, *see Martin v. Wilks*, 110 S. Ct. 11 (1989), but the terms of the decree and the circumstances of its entry do corroborate the City's assertion that it had a rational basis for its affirmative action policy. Indeed the only real attack on the City's rationale is that it is not contained in some formal document or plan. A formal finding of discrimination is not required. *Wygant v. Jackson Board of Education*, 106 S. Ct. at 1853 (O'Connor, J., concurring); *id.*, 106 S. Ct. at 1863 (Marshall, J., dissenting). The basis shown by the City here is enough. And there are, in a real sense, two

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the needs for captains. The City regards all above the cut-off score as qualified; it does not find those below to be unqualified. In this case the Department of Personnel specifically determined, on the basis of the scores of the two blacks, that they were qualified to serve as captains. Nor was this the first time the City had made promotions of persons (including whites) whose scores were below the cutoff. Moreover, the City does not defend the validity of the test used by the City as a component of the ranking score. The score includes performance ratings which the City recognizes as discriminatory.

[6] In June, 1987 minorities were 3.6% of Captains (including the two challenged promotions); external availability in the general population was 46%; internal availability (existing lieutenants) was 13.6% minority.

existing formal declarations of affirmative action goals and methods. The first is embodied in the 1980 consent decree, and the other is an appendix to the union contract.

There is finally no basis for challenging, on equal protection grounds, the decision to refuse to make further promotions from the 1979 list as plaintiffs first argued. When the decision was made every name on the list belonged to a white male. The City could reasonably conclude that the use of a state list ought to be deferred where its use would perpetuate effects of past discrimination and increase racial disparities. Deferring promotions excluded no one and preferred no one, and all plaintiffs were free to seek a place on the new list. There is no clear evidence that any promotions would have been made before the new list was posted. Five promotions were considered, but the Fire Commissioner did stale that the need for new captains was not so urgent that it could not await the replacement of the old list.

The defendants' motion for summary judgment on the equal protection claim is granted.[7]

The defendants' motion under 28 U.S.C. Sec. 1927 for sanctions of $562.25 (the cost of expedited transcript) is granted.

Enter:

/s/ James B. Zagel
JAMES B. ZAGEL
United States District Judge

Date: 16 Feb 1990

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[7] In *City of Richmond v. J. A. Croson*, 109 S. Ct. 706 (1979) the Court invalidated a program of affirmative action because (1) the discrimination to be remedied was that of society in general, not of or in the City of Richmond, (2) the beneficiaries were not themselves victims of discrimination, and (3) there was a specific quota whose level was set arbitrarily. In this case the showing was made that the City discriminated against blacks in developing the 1979 list and the remedy neither involved arbitrary quotas nor excluded whites from advancement.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 8731

HONORABLE JAMES B. ZAGEL

EARL BILLISH, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, nine white Fire Lieutenants employed by the City of Chicago, filed a two-count complaint against the City and Louis Galante, the City's Fire Commissioner, in his individual and official capacities. Count I alleges that the plaintiffs were deprived of their right to promotion to Fire Captain without due process of law; it seeks an order directing defendants to promote plaintiffs, and compensatory damages. Count II asserts a claim of reverse discrimination in violation of the equal protection clause. This Court denied plaintiffs' motion for a temporary restraining order on October 15, 1987. Before the Court is defendants' motion for summary judgment on the due process claim. Before turning to the merits of the motion, a brief review of the procedural history of this case is necessary.

The following chronology of events is set forth in two motions filed by the defendants, Defendants' Response Opposing Plaintiffs' Request for a Thirty Day Extension of Time and Defendants' Motion for Ruling Under Local

General Rule 13(b). When these motions were presented to the Court, the statements contained there were not disputed by the plaintiffs in a material way, so we accept them as true.

When this Court denied plaintiffs' motion for a temporary restraining order, plaintiffs' counsel urgently requested an expedited schedule for holding an injunction hearing. Defendants' counsel requested a reasonable time for discovery and for filing a motion for summary judgment. In response to plaintiffs' request, we set a schedule under which cross-motions for summary judgment would be fully briefed by January 4, 1988. This schedule was subsequently extended by one week.

Defendants state they would have appreciated an additional month to prepare their summary judgment papers, since it was impossible to conduct thorough research or begin preparation of a brief during the short period of discovery. However, defendants' counsel made substantial efforts to comply with the Court's schedule, which included finding other counsel to handle ongoing litigation and shortening a planned trip out of state during the Christmas holidays. Despite these efforts, defendants were unable to complete their motion by the due date. Plaintiffs' counsel refused to agree to an extension of even one week; this Court, however, granted the extension. We allowed defendants to file their motion two days past the due date.

Plaintiffs' response to the motion was due three weeks later. Instead of filing their response, plaintiffs sought a thirty-day extension on or close to the day the response was due. In view of plaintiffs' prior insistence on an expedited schedule and the efforts made by defendants to comply with that schedule, defendants opposed the motion for a thirty-day extension. Defendants recognized that plaintiffs' counsel had not yet prepared his brief, and to avoid prejudice to the plaintiffs, defendants proposed a fourteen-day extension. This Court agreed that a thirty-

day extension was unjustified under the circumstances, and granted plaintiffs an additional fourteen days.

After this extension was granted, plaintiffs' response was due Friday, February 12, 1988. Counsel for plaintiffs requested they be given the weekend to file their response, and as a courtesy, defendants' counsel agreed. As of February 24, 1988, defendants still had not received plaintiffs' response, nor had they received a motion for more time or a phone call regarding the delay. (The docket sheet reveals that plaintiffs did not seek an extension of time.) Defendants then filed their Motion for Ruling Under Local General Rule 13(b). (Rule 13(b) provides that the Court may grant a party's motion without further briefing or hearing, when the opposing party has failed to file its response.) Defendants' motion was presented to the Court on the same day that plaintiffs presented a motion to file their responsive memorandum instanter.

Based on all of the foregoing, in an oral ruling on February 24, 1987, we granted defendants' motion for ruling under Local Rule 13(b) and denied plaintiffs' motion to file instanter their responsive memorandum.[1] We indicated in open court that we would not simply grant defendants' motion by default, but rather would examine critically the motion and supporting evidentiary materials. For the reasons set forth below, defendants' motion for partial summary judgment on Count I, the due process claim, is granted.

I.

The facts giving rise to this action are essentially undisputed. In 1978, all of the plaintiffs took and passed a promotional examination for the position of Fire Captain. These examinations are administered by the City of Chi-

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[1] Subsequently, we did allow plaintiffs' motion to file their cross-motion for summary judgment on the equal protection claim. This opinion addresses only the due process claim.

cago. Each plaintiff was then placed on the Fire Captain's eligibility list which was posted in 1979. The names of the individuals eligible for promotion were listed in rank order, with the individual who received the highest score being ranked first. Plaintiffs were ranked from No. 239 to No. 281 on the 1979 list. In 1986 and early 1987, the City administered a new Captain exam. Every Lieutenant, including the nine plaintiffs and others who remained on the 1979 list, were eligible to take this exam. Each plaintiff took and passed this exam and was ranked on the new list.

The last promotions from the 1979 list were made effective January 16, 1987. On July 13, 1987, the 1979 list was cancelled by order of the Commissioner of Personnel.[2]

On October 1, 1987, defendant Galante issued a promotional order, promoting 24 Lieutenants from the new list to the rank of Captain effective October 16, 1987. None of the nine plaintiffs—the highest scoring of whom ranked No. 41 on the new list—was among the 24 promoted. Of the 24 Lieutenants promoted, 18 were white, 5 were black, and one was Hispanic.

II.

In Count I of their complaint, plaintiffs allege that the City has a custom and practice of filling vacancies from the list in effect at the time the vacancies occurred. Compl., par. 20. In other words, they allege they have a protectible property interest in the promotions because it was the City's custom and practice to fill all vacancies before cancelling a list. They also allege, without citing to any

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[2] Plaintiffs allege that they have never been *officially* notified of the termination of the 1979 list, nor have they been *officially* informed by defendants that no further promotions will be made from the 1979 list. Compl., par. 21. Even if this is true, it is irrelevant, since it is clear from the filing of this suit that they have *actual* knowledge of these matters.

specific statute, rule, or regulation, that "pursuant to Illinois law", the City has appointed individuals in rank order from the eligibility lists as the vacancies occur. *Id.*, par. 16. By cancelling the 1979 list and promoting instead from the 1987 list, plaintiffs say, the City deprived plaintiffs of a property interest without due process of law.

In order to prevail on their due process claim, plaintiffs must first establish that they had a protectible property interest in the promotions.[3] The principles governing this determination, as announced in *Perry v. Sindermann,* 408 U.S. 593 (1972), *Board of Regents v. Roth,* 408 U.S. 564 (1972), and their progeny, are well established and need not be set forth in great detail. In order to establish the existence of a protectible property interest, a plaintiff must point to state law, rules, or a mutually explicit understanding that support his claim of entitlement to the benefit he seeks to protect. A unilateral expectation is not enough. Once a plaintiff shows he had a protected property interest, he must then prove he was deprived of that interest without adequate procedural protections.

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[3] It is clear that plaintiffs seek to assert a property interest in the promotions. Plaintiffs might claim that they had a property interest in the right to compete against qualified applicants. If this argument were made, plaintiffs would lose on their due process claim. It is a matter of common sense that the employer, not the employees, determines who is qualified for a position, and there is nothing in the record that indicates the contrary is true in this case. Plaintiffs were given the right to compete, and in fact each of them did compete for the position by taking the exam.

In any event, as the Seventh Circuit observed in a similar case involving promotions, what the plaintiffs are really interested in is the job, not competing for it. *Bigby v. City of Chicago,* 766 F.2d 1053, 1056 (7th Cir. 1985) (". . . it is not the examination that the applicant is interested in—no one likes taking tests—but the job."). Plaintiffs themselves have clearly expressed this view. Complaint, par. 24B (requesting this court to direct defendants to promote plaintiffs to the rank of Captain); Emergency Motion for T.R.O., par. 1 ("plaintiffs have filed this action to gain promotions to the rank of Fire Captain.").

Defendants maintain that plaintiffs cannot establish the existence of a protectible property interest for either of two reasons. First, defendants say, no statute, rule or mutually explicit understanding requires the City to fill vacancies before replacing an eligibility list. Second, even if the City were required by statute, rule or City policy to fill all existing vacancies before replacing an eligibility list, plaintiffs would have no property right to promotion because the Fire Commissioner may exercise discretion in selecting individuals for promotion. We address each of these contentions in turn.

III.

We first examine various written sources as possible bases for a protected property interest. The City's Personnel Rules address the duration of promotional lists. Personnel Rule VII requires that a promotional eligibility list for Firefighters must remain up for at least two years. Thereafter, the Commissioner of Personnel may, in his or her discretion, extend the life of the list for an unspecified period of time.[4] There is nothing in Personnel Rule VII that creates a right to promotion from an eligibility list

---

[4] Personnel Rule VII provides in relevant part:

Section 3—General Employment Lists

(d) *Life of Lists*—General employment lists shall have a life of one year, except as otherwise determined by the Commissioner of Personnel. The Commissioner of Personnel may extend the life of a list when in his or her judgment the list is still viable and such extension is for the good of the service.

* * *

Section 4—Promotional Lists

Promotional lists shall be prepared and maintained identically to general employment lists, Section 3(a)-(e) above. In the cases of promotional lists for Sworn Police and Uniformed Firefighter positions, the life of lists shall be at least two years.

Appendix to Accompany Defendants' Motion for Summary Judgment ("Appendix"), Exh. F.

when vacancies occur during its existence. Our review of the record discloses no other Personnel Rule directly related to promotions.

We turn then to the labor contract between the City and the Fire Fighters Union.[5] The contract has been enacted as an ordinance by the City. Appendix, Stensland Aff., par. 4. Section 9.3 of the operative labor contract (Appendix, Exh. A) addresses vacancies and promotions. Section 9.3B.2 provides as follows:

> 2. Promotional vacancies shall be filled by the Commissioner from eligible employees certified from the applicable promotional eligibility list. Employees shall be certified for promotion in order of their rank on the list. The employees certified for promotion shall be the five employees having the highest scores (rank) for each position to be filled, but in no event more than fifteen (15) employees more than the number of vacancies to be filled. Vacancies will customarily be filled by employees in the order of their ranking on the list. An employee certified for promotion to a vacancy may be passed over for any vacancy on an order subject to the following conditions.
>
> a. No employee may be passed over on more than two orders.
>
> b. No employee shall be promoted from a new promotional list until all employees who may have been passed over on a previous promotional order have been promoted.
>
> c. An employee may be passed over on an order only for the following reasons:

---

[5] Chicago Fire Fighters Union, Local No. 2 is the exclusive bargaining representative of plaintiffs, who are all members of the uniformed non-exempt ranks. Local No. 2 has had contracts with the City since 1980.

> i. At the time the vacancy occurs the employee is on an injury leave of six months or more for a non-duty related injury; . . . .
>
> ii. A major disciplinary infraction (i.e. charges resulting in a suspension of 15 days or more); . . . .
>
> iii. In order to comply with affirmative action ordered by a court.
>
> The Employer shall specify the specific reason in the event that it decides to pass over an employee on an order.

It might be argued that section 9.3B2.b requires the City to fill existing vacancies before replacing an eligibility list. We find, however, that that section is not applicable because plaintiffs were not "passed over" within the meaning of that section. After examining section 9.3B2.b in context, as well as an arbitration decision construing section 9.3B, we conclude that plaintiffs' failure to be promoted from the old list is *not* the equivalent of being "passed over."

Section 9.3B.2c specifies three grounds upon which the Commissioner may pass over an employee and thus promote out of rank order. An arbitrator has ruled, reading this provision in conjunction with other provisions in the contract, that these three reasons are not exclusive. Rather, the Commissioner also may promote out of rank order if he has "reasonable grounds" for doing so. Opinion and Award of Arbitrator Elliott H. Goldstein in *City of Chicago and Chicago Fire Fighters Union Local No. 2*, Arb. No. 8538 (January 9, 1986) ("Goldstein Arbitration"), and Supplemental Award of the Arbitrator ("Supplemental Award"), Appendix, Exh. B. While the issue in that arbitration was not the meaning of the term "pass over", it is implicit in the decision that the term addresses the following situation. Employee A, who ranks higher on the list than Employee B,

is not promoted; instead, Employee B is promoted. In that situation, Employee B has been promoted out of rank order, and Employee A has been "passed over." *See* Goldstein Arbitration at pp. 37-44; Supplemental Award at p. 10. Here there is no allegation that plaintiffs came up for promotion but were not promoted for a particular reason, valid or otherwise. Instead, the entire list was cancelled, and everyone on that list, and anyone else who wished to compete, was required to take a new examination. Moreover, the Goldstein Arbitration specifically addressed the term "order" as used in section 9.3B2. Although the record is unclear, it appears that plaintiffs were never "on an order" for purposes of that section.

For these reasons, section 9.3B.2.b of the labor contract does not aid the plaintiffs. Plaintiffs were not passed over, thus the provision is inapplicable. Instead, plaintiffs were on a promotional eligibility list for a number of years, and that list was subsequently replaced by a new one. The provision does not support a claim that the City was required to fill existing vacancies—*i.e.*, promote the plaintiffs—before promoting from the new list.

Defendants maintain, and we agree, that, subject to one limitation, the Fire Commissioner has discretion to determine whether and when promotions should be made. The one limitaiton is that promotions are required when necessary to maintain contractual "minimum manning" requirements. In such cases, section 9.3A of the labor contract requires that a position made vacant through attrition must be filled through promotion within 45 days. The City has been successful in maintaining the Commissioner's discretion in determining when vacancies will be filled. In 1986, the Union sought to require the City to fill *all* positions open through attrition within 45 days. The Interest Arbitrator rejected this proposal, stating:

> By this proposal, the Union seeks to force the City to fill all vacancies by promotion within forty-five days of their occurrence. The City argues, and the Arbitrator concurs, that this determination is a management prerogative. The City has the right to decide based on a number of considerations (including but not limited to need, safety and manning requirements) whether or not and when to make a promotion. The proposal is rejected.

Appendix, Exh. C, Award of Arbitrator I.M. Liebermann in *City of Chicago and Chicago Fire Fighters Union Local No. 2, AFL-CIO*, Case No. 51-39-0058-84-R (March 13, 1986) at 23.

In sum, we agree with defendants that the Personnel Rules and labor contract (including arbitration decisions construing that contract) require only that eligibility lists stay up a minimum of two years, and that positions necessary to meet minimum manning requirements be filled within 45 days of becoming vacant. Beyond these restrictions, the City has complete discretion in deciding when to replace eligibility lists and when to make promotions. Furthermore, section 9.3B.2.b of the labor contract, which addresses "pass overs", is not applicable here.

IV.

Having found that no statute, rule or ordinance creates a property interest in promotion, we turn to plaintiffs' allegation that the City's custom and practice created such an interest. Specifically, plaintiffs claim that the City had a custom and practice of filling vacancies from the list in effect at the time the vacancies occurred. Complaint, par. 20. We find that plaintiffs cannot support such a claim.

The source of a protectible property interest may be an employer's unwritten common law, which may be implied from the employer's policies and practices. *Perry*

v. Sindermann, 408 U.S. 593, 601-03 (1973). Yet a plaintiff relying on a custom and practice must still demonstrate the existence of a mutually explicit understanding. *Id.* at 601. Past practice alone is not enough. *Leis v. Flynt,* 439 U.S. 438, 444 n. 5 (1979) ("a constitutional right can[not] be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past.") (Emphasis in original.) *See also Archie v. City of Racine,* 847 F.2d 1211, 1225 (7th Cir. 1988) (Posner, J., concurring) (property interest "cannot be built on a expectation created merely by practices or probabilities" (citing *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 465 (1981))); *Hermes v. Hein,* 742 F.2d 350, 355 (7th Cir. 1984) (property interest cannot be established "solely through the past practices of the employer.").

In a factually similar case, plaintiffs, who were police officers, claimed their employer had a policy of promoting in exact rank order from an eligibility roster. *Hermes v. Hein,* 742 F.2d 350 (7th Cir. 1984). The Seventh Circuit noted that past practices alone could not establish a protected "common law" of employment. *Id.* at 355. The Court concluded plaintiffs had not established the existence of a protectible property interest where there was no evidence from which it could be inferred that the alleged policy was ever promulgated throughout the police department or stated to any of the plaintiffs. *Id.* Moreover, where a plaintiff is relying on verbal or written assurances from the employer, those assurances must be from an entity or person with authority to bind the employer. *Hadley v. County of DuPage,* 715 F.2d 1238, 1242-43 (7th Cir. 1984) (verbal assurances of continued employment from individual County Board members insufficient; the necessary "mutuality" would require an assurance from the County Board itself).

The plaintiffs' own depositions show that the alleged custom and practice was never promulgated or communi-

cated to them by someone with authority to bind the City. They acknowledged that they never received any communication, either oral or written, from anyone in authority in the Fire Department assuring them either that they would be promoted from the 1979 list or that all existing vacancies would be filled before the list would be replaced. Appendix, Dunne Dep. 85-86; Billish Dep. 62-63; Scavone Dep. 40; Jaguszewski Dep. 108-109; Miller Dep. 64-65. As in *Hermes,* given plaintiffs' inability to point to any communications from defendants regarding the alleged policy, we must conclude that the plaintiffs cannot show there was a mutually explicit understanding.

In addition, although plaintiffs allege generally that a custom and practice existed, several of them in their depositions were unable to point to even one instance where all vacancies were filled from an existing list. Appendix, Miller Dep. 105; Billish Dep. 64; Jaguszewski Dep. 111. Thus, not only have the plaintiffs conceded that no one in authority communicated the alleged custom and practice to them, but the plaintiffs themselves appear to have no personal knowledge that the custom and practice was ever followed.

For these reasons, we find that there is no independent source which supports plaintiffs' contention that they had a legitimate claim of entitlement to promotion from the 1979 list. Therefore, they cannot show they had a property interest in the promotions entitling them to due process protections.

V.

Alternatively, defendants argue that even if the City were required by some independent source to fill existing vacancies before replacing an eligibility list, plaintiffs would have no property interest because of the Fire Commissioner's discretion in selecting individuals for promotion.

The promotional process is set forth in section 9.3B.2 of the labor contract, which is reproduced above. The Personnel Department certifies to the Fire Commissioner a number of eligible candidates in excess of the number of vacancies to be filled. Section 9.3B.2 provides that the Commissioner must "customarily" promote in rank order. He may promote out of rank order for any of the three reasons enumerated in section 9.3B.2.a.-c. Moreover, as we have noted, an arbitrator has ruled that these three reasons are not exclusive; the Commissioner "has the right to promote out of rank order" if he has "reasonable grounds" for doing so. Appendix, Exh. B, Goldstein Arbitration at 43.[6]

We agree with defendants that the fact that the Commissioner may, upon reasonable grounds, promote out of rank order defeats plaintiffs' claim of a legitimate entitlement to promotion.

Defendants rely on *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985) and *Houk v. Village of Oak Lawn*, 647 F. Supp. 710 (N.D. Ill. 1986), both of which held that because of the discretion vested in the employer, plaintiffs had only a unilateral expectation of promotion.[7]

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[6] The Goldstein Arbitration involved a Union challenge to certain non-rank order promotions made in 1984 and 1985 to the ranks of Captain and Battalion Chief. A number of the challenged promotions were justified by the City on affirmative action grounds, and these promotions were sustained by the Arbitrator. Goldstein Arbitration at 44, 46. Other non-rank order promotions had been made for reasons unrelated to affirmative action. The Arbitrator ruled in the City's favor as to some but not all of these promotions. See Appendix, Exh. B, Supplemental Award of the Arbitrator (March 18, 1986) at 2-3, 7-9.

It is obvious from the Goldstein Arbitration that the Commissioner has exercised his discretion to promote out of rank order in the recent past. Thus plaintiffs could not claim that defendants' reliance on the Commissioner's discretion is pretextual.

[7] Arguably, *Bigby* may be read as holding that there can *never* be either a property or liberty interest in a promotion. *See Bigby*,

It appears from those decisions that the discretion the defendant employers possessed was broader than the discretion the Fire Commissioner has to promote out of rank order. The Fire Commissioner must have reasonable grounds; grounds accepted by Arbitrator Goldstein included affirmative action goals and pending criminal charges against an employee. Appendix, Exh. B, Supplemental Award at pp. 6, 8. In contrast, in *Houk*, the employer apparently had unfettered discretion to choose one of three candidates for promotion, and in *Bigby*, promotion depended on a number of factors, some of which involved the exercise of discretion.

Nevertheless, we think that the discretion the Fire Commissioner possesses, though limited, makes this case sufficiently similar to *Bigby* and *Houk* that the result is the same. That the Commissioner may promote out of rank order for a number of reasons means that plaintiffs' expectation of promotion from the 1979 list was not so firm and definite an expectation as to rise to the level of a protected property interest. *See Bigby*, 766 F.2d at 1056. The Seventh Circuit has described a property interest as that which "is securely and durably yours under state . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 417 (7th Cir. 1988) (quoting *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983)). Because of the Commissioner's limited right to promote out of rank order, the rank of Captain (which, after all, is what the plaintiffs really want) did not "securely and durably" belong to plaintiffs, but rather was "uncertain", even assuming that defendants were required to fill all vacancies from the 1979 list before replacing it with a new list.

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766 F.2d at 1059-60. However, defendants do not argue for such a reading, and the point is, as we said, arguable.

Significantly, plaintiffs' depositions reveal that *they* didn't even have a firm expectation that promotions would be made in rank order. Plaintiff Herling stated that "there's not even a promise that when the list gets posted that the number one guy could get promoted. That's how much of a promise you've got from the City." Appendix, Herling Dep. 106; see also Carasotti Dep. 32; Graf Dep. 77. They believed that, at least in the past, promotional decisions were sometimes based on favoritism or politics, and they knew that various events such as a promotional freeze or the City's affirmative action goals might mean their promotions wouldn't come through. Herling Dep. 42-44; Dunne Dep. 12-13; Billish Dep. 22-25, 42-44; Scavone Dep. 22. Thus, plaintiffs evidently viewed what they claim to be a custom and practice as, in reality, something that was subject to a variety of contingencies.

In sum, we find that, even assuming defendants were required to fill vacancies from the list posted at the time the vacancies occurred, plaintiffs would lack a property interest in promotion to the rank of Captain.

Having determined that plaintiffs possessed no protectible property interest, we need not address the second prong of the due process analysis, whether plaintiffs were deprived of an interest without adequate procedural protections.[8]

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[8] In a Minute Order dated September 27, 1988, we allowed plaintiffs leave to file their cross-motion for summary judgment on Count II, the equal protection count, and set a briefing schedule. Since the motion directed to the due process claim already had been taken under advisement, our Order did not contemplate that the parties would again address that claim. Thus we have not considered defendants' additional arguments and evidentiary material on the due process claim that are contained in their brief filed November 4, 1988.

We note in passing, however, that an arbitrator's award issued May 23, 1988 is consistent with our conclusions in this opinion in two respects. The Arbitrator ruled, among other things, that the City has the right to determine who is qualified for the position

For the foregoing reasons, we find that there is no genuine issue of material fact that defendants are entitled to judgment as a matter of law on Count I of the complaint, the due process claim. Partial summary judgment is granted in favor of defendants and against plaintiffs on Count I of the complaint.

Enter:

/s/ James B. Zagel
JAMES B. ZAGEL
United States District Judge

Date: Nov. 28, 1988

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of Captain (see *supra* note 3). He also ruled that employees are entitled to promotion before retirement of an eligibility list only when they have been bypassed for promotion after having first been listed for promotion on a promotional order (see *supra* pp. 9-11.). Exhibit B to City of Chicago's Mem. in Opp. to Plaintiffs' Cross Motion for Partial Summary Judgment, Opinion and Award of Arbitrator Edwin H. Benn in *Chicago Firefighters Union, Local No. 2 and City of Chicago* (May 23, 1988) at 30-31, 35.

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No. 93-4

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,
v.
EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,
v.
CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondent, Chicago Fire Fighters Union Local No. 2, and twenty-two individual members of the union who are also Respondents in *Daley v. Chicago Fire Fighters Union Local 2*, respectfully submit this brief in opposition to granting the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

A. Supplanting Validated Promotional Exams With a System of Quotas

In the summer of 1987, the Commissioner of the Department of Personnel of the City of Chicago instructed the Commissioner of the Chicago Fire Department ("CFD") that until "the effects of past discrimination have been corrected," 25% of all future promotions to the ranks of engineer and captain within the CFD were to be reserved for CFD minority members. (Chicago Fire Fighters, R. 71: Exs. E and F, at 1, 4; Pet. App. 24a, 87a; Resp. App. 8a, 15a-16a.)[1] The promotional quotas of 20% black and 5% Hispanic were conceived by officials of the City's Departments of Law, Personnel and Fire at a series of private meetings which were not open to either members of the public or rank and file nonminority CFD employees who stood to lose promotional opportunities on account of the quotas. (R. 76: Joyce Dep. 222-24.)

The City began implementing promotional quotas within the CFD once the program received approval from the Mayor, who at that time was the late Harold Washington. On August 16, 1987, 8 black firefighters were awarded out-of-rank-order promotions to engineer. (R. 26: Answer, ¶¶ 14, 28; Pet. App. 87a.)[2] The preferences

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[1] All record references herein are to the record in *Daley v. Chicago Fire Fighters Union*, and citations to the opinions of the court of appeals (1a-83a) and those of the district court (84a-106a) refer to the appendix attached to Petitioners' writ, and will be noted as "Pet. App." References to materials in the appendix attached to Respondents' brief in opposition will be designated as "Resp. App."

[2] In the previous 12 months minorities had received 21.68% of the engineer promotions which were awarded on a rank order basis. (R. 71: Def. Exs. L, N.) And 9 of 48 rank order promotions to engineer on August 16, 1987, were awarded to minorities; the 8 additional out-of-rank-order promotions increased the minority

that were given to these minority firefighters, by promoting them out of sequence on the engineer promotional eligibility list, caused 8 nonminority firefighters—some of the Respondents herein—to be passed-over, although they had attained higher scores on the engineer promotional examination.

Likewise, on October 1, 1987, the City promoted 24 CFD lieutenants to the rank of captain. The first 23 promotions were done in sequence from the captain promotional list, and 5 black lieutenants (21.74%) were among the 23 lieutenants promoted in rank order to captain. However, because none of those promoted in rank order was Hispanic, the City, in keeping with the 25% quota, made one additional promotion, out-of-rank-order, to an Hispanic-American. (R. 26: Answer, ¶ 31; Pet. App. 28a, 87a.)

Both the engineer and captain promotional eligibility lists, which became subject to 25% quotas beginning in mid-1987, were compiled from final scores attained on the first set of CFD promotional examinations administered by the City to firefighters and lieutenants, respectively,[3] since the entry of the consent decree in *United States v. Albrecht,* Nos. 73 C 661, 80 C 1590 (N.D. Ill. March 31, 1980). (The consent decree is also referred to as the "order of settlement".) (R. 71: Joyce Aff. ¶ 7; Resp. App. 1a-7a.) The 1980 consent decree established a 1-to-4 minority/white promotion ratio, but this 20% quota was an interim measure, because it only applied to the 1979 lieutenant and engineer promotion lists; both of those eligibility lists have since lapsed and are not in-

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share of engineer promotions on that date from 18.75% to 30.35%. (Pet. App. 4a.)

[3] For the examinations at issue only firefighters were eligible to take the engineer examination, and only lieutenants were eligible to sit for the captain examination. (Pet. App. 3a; R. 74: Undisputed Facts, ¶ 7.)

volved in the *Chicago Fire Fighters* proceeding. (Resp. App. 3a; Pet. App. 21a, 92a.)

With respect to "future promotional eligibility lists," the consent decree did not establish any numerical quotas; rather, the decree provides that new promotional examinations were to be validated in accordance with the EEOC's Uniform Guidelines on Employee Selection Procedures. (Resp. App. 4a-6a; Pet. App. 6a.) To that end, the City spent four years developing the engineer exam, and consulted with the Department of Justice on a regular basis over the format and validation of the exam, as required by the consent decree. (R. 76: Joyce Dep. 15, 25-6, 136.)

Of the 1,035 firefighters who took the written portion of the engineer exam on January 19, 1985, 23.1% (239) were black and 6.7% (69) were Hispanic. This meant that the percentage of minorities taking the exam (29.8%) exceeded the percentage of minority firefighters employed by the CFD. (R. 76: Pltfs.' Ex. 1; Resp. App. 21a.) At the Department of Justice's suggestion, the written component was graded on a pass/fail basis to minimize adverse impact. (R. 76: Joyce Dep. 23-7.) Still, the raw scores resulted in serious adverse impact to minorities. To ameliorate this effect, the City standardized the scores on the basis of race. (*Id.* at 80, 90-1, 100.) Once race-normed, the pass rate for minorities was 52.92%, while the white pass rate was 62.44%, which meant that the success rate of minorities compared to the success rate of whites—84.75%—satisfied the "four-fifths" rule of the EEOC's Uniform Guidelines. 29 C.F.R. § 1607.4 (D).

A passing grade on the written component of the engineer exam qualified an applicant to take the practical, or "hands-on," portion of the test, which was conducted on a fire engine simulator. That device simulates the most "critically important" duty of an engineer, which is to supply a pressurized stream of water at the scene of a

fire, a task that requires proficiency in making hydraulic calibrations. (R. 76: Joyce Dep. 50, 102-06.) The simulator test score accounted for 90% of the cumulative grade on the engineer exam. Thus, both the City and the Department of Justice sought assurances that the simulator scores "would be suitable for ranking purposes." (*Id.* at 37.) Hence, an exhaustive pilot study was undertaken to determine if simulator test scores were feasible as a "ranking tool." (*Id.* at 34-5, 40, 48.) The pilot study was conducted among 40 incumbent engineers, half of whom were minorities, and the results satisfied the City that "there was a fair distribution of scores," with no indication of adverse impact, so that the simulator test scores "could be satisfactorily used as a ranking device." (*Id.* at 48-9.) The actual scores on the simulator test revealed that the minority pass rate (75.5%) compared to the white pass rate (87.1%), was 86.7% (.755/.871=.867), so adverse impact could not be inferred under the 80% rule. (*Id.* at 126-27.)

A content validation study was also performed for the captain promotional examination, and here again, pursuant to the consent decree, the Department of Justice had to be kept apprised of "each component or step of the selection process". The City "rigorously scrutinized" each component of the captain exam (and of the engineer exam, too). (R. 76: Joyce Dep. 181-82, 190-92, and Exs. 19, 23; R. 80: Undisputed Facts, ¶ 4; Resp. App. 5a-6a.) In September, 1986, the multiple choice portion of the test was administered to 543, or 86.8%, of the CFD's 625 lieutenants. While the participation rate among white lieutenants was 85% (463), 100% of all black lieutenants (63), and 94% of Hispanic lieutenants (17), took the captain exam. Consequently, for the labor pool eligible to take the captain exam, i.e., lieutenants, no disproportion existed on account of race among lieutenants who took the captain exam compared to lieutenants who were eligible to take the exam. (R. 74: Undisputed Facts, ¶ 12; R. 76: Joyce Dep. 196-98.)

The results of the written and oral components of the captain exam, which were thoroughly analyzed by the City for any hint of racial disparity, demonstrated that "there was no[] . . . practical significance in the difference [in the scores] between the various racial groups." (*Id.* at 206.) Hence, as acknowledged by the Commissioner of Personnel, Jesse Hoskins, neither the written or oral testing component, nor any other element of the captain examination (including rank order selection from the eligibility list), created any adverse impact whatsoever on minorities. (R. 74: Undisputed Facts, ¶ 13; R. 76: Hoskins Dep. 14, 39; Joyce Dep. 225, 227-28, 239-40.) Indeed, based on the City's projection that there would be 150 promotions from the captain eligibility list, awarding promotions in rank order on the basis of final test scores would have resulted in a success rate (i.e., promotion) of 50% for blacks and 46.6% for Hispanics. In contrast, the success rate for white lieutenants was only projected to be 42.9%. (R. 76: Joyce Dep. 227.)

B. The Receptivity of the District Court and Court of Appeals Panel to the Variable Reasons Offered by the City in Justification of the Quotas

The validation of both examinations in accordance with the consent decree, the elimination of adverse impact from the exams' testing components, the proportion of promotions that would be awarded to minorities on a strict rank order basis (21.14% of engineer promotions and 18.7% of captain promotions), did not, however, make any notable impression on the Washington administration. Instead, the "affirmative action" directives imposing the 25% promotional quotas, which issued for engineer on June 16, 1987, and for captain on July 9, 1987 (Resp. App. 8a, 15a), were justfied by Commissioner of Personnel Hoskins on three grounds common to both exams, and a fourth ground germane to the engineer exam alone:

1. The City, according to an opinion from the Corporation Counsel, would be in violation of the 1980

consent decree if it promoted in "strict rank order," (Resp. App. 9a, 16a), because the decree's "long range goal" was "to increase substantially the minority composition in each of the promotional ranks of the [CFD] with the objective that each rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made." (Resp. App. 2a.) Of course, minority composition of the engineer and captain ranks would "become more representative of the racial and ethnic composition of the . . . ranks from which promotion to it are made," because the minority share of promotions on a rank-order-basis from the new lists were projected at 21% for engineer (at a time—1987—when minorities held 11% of the jobs as engineers, and accounted for 29% of all firefighters), and 18.7% for captain (when minorities held 3.6% of the captain jobs and 13.6% of all lieutenants were minorities). (Resp. App. 21a; R. 19: First Amended Complaint, Ex. A.)

The City, however, maintained that the consent decree demanded that minority composition within each rank "*mirror* the racial composition of the preceding rank." (Pet. App. 92a; emphasis added.) The City contended (and the district court and panel opinion concurred) that this goal had not been attained because in the seven years since the decree's entry, minorities had lost ground. (*Id.*, Pet. App. 38a.)[4]

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[4] The percentage of minority captains did drop between 1979, just prior to the consent decree's entry when 5.96% of captains were minorities, and mid-1987, when the City imposed 25% promotional quotas at which time minority captains accounted for 3.60% of that rank. However, for the officer corps as a whole (the ranks of lieutenant, captain and battalion chief), minority representation during this 7½ year period increased from 3.4% (32/940) to 10.35% (97/937). Moreover, for the CFD's most populous position, the rank of firefighter, minority representation more than doubled, going from 14.22% (388/2727) to 29.17% (799/2739). (R. 70: Undisputed Facts, ¶ 4; R. 71: Cole Aff. ¶ 12; R. 76: Pltfs'. Ex. 1; Resp. App. 21a.)

Furthermore, after Respondents in *Chicago Fire Fighters* brought suit in the district court, the City asserted that even if the consent decree by its terms did not mandate 25% quotas with respect to the new promotional exams,[5] the history of litigation leading up to the consent decree, if not the decree itself, justified the 25% quotas. (R. 70: City's Memorandum in Support of its Motion for Summary Judgment, p. 17.) The district court agreed with the City's assessment that in *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978), while "no formal findings of discrimination were made. . . . the Department of Justice had made out a prima facie Title VII case of discrimination based upon the disparate impact of the [1969] Engineer, [1970] Lieutenant, and [1973] Captain exams. . . ." (Pet. App. 93a.) The panel decision took a significant leap in logic from the district court's opinion, when it concluded "that the City of Chicago's assessment that its policies *violated the Constitution* was a realistic one." (Pet. App. 36a; emphasis added.)[6]

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[5] A tacit concession to the holding in *Fire Fighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984), that a consent decree "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties."

[6] Although the complaint by the Department of Justice in *United States v. City of Chicago*, No. 73 C 661 (N.D. Ill.), included an allegation of constitutional violations under the Equal Protection Clause of the Fourteenth Amendment, the district court held that the constitutional claims could not survive after *Washington v. Davis*, 426 U.S. 229 (1976): "The weight of the evidence satisfies us that defendants, since at least 1966, have acted in good faith and conscientiously in attempting to eliminate race as a factor in making promotions. . . . Plaintiff has failed to show a discriminatory intent or purpose . . . and the statistical disproportion of promotions . . . among the white and non-Latino groups does not, in our opinion, give rise to a reasonable inference of unconstitutional or otherwise unlawful motives." *United States v. City of Chicago*, 14 FEP Cases 882, 884 (N.D. Ill. 1976). This holding was not challenged on appeal, with the Seventh Circuit ruling that for Title VII purposes "a plaintiff need only show that facially neutral standards have a

2. The City's affirmative action directives also attempted to justify the 25% quotas through invocation of a provision in the collective bargaining agreement, known as Appendix G, which enunciates the "goal" of 45% representation by minorities within the CFD, a goal that the City had "a very long way to go in meeting," noted Commissioner Hoskins. (Resp. App. 9a, 16a.) An integral provision of Appendix G, captioned "remedying past discrimination", also required the City to undertake a "review of the status of all Black and Hispanic fire fighters in order to determine those whose time in grade would make them eligible for promotion had not discriminatory practices existed in the past." (R. 82: Pltfs.' Ex. 3.) Yet, the affirmative action directives make no anecdotal references to instances where an Appendix G review uncovered past discrimination that impaired promotional opportunities for minorities, and no inquiries independent of the Appendix G review were conducted to determine whether any minority who might be awarded a preferential promotion had suffered employment discrimination caused by the City. (R. 74: Undisputed Facts, ¶ 19; R. 76: Joyce Dep. 170, 226.)

Neither the district court nor the panel of the Court of Appeals afforded probative value to the contract's affirmative action appendix,[7] except to remark that the clause "corroborate[s] other more direct evidence of past discrimination in the CFD." (Pet. App. 41a, 95a.)

3. The district court and the panel opinion viewed "statistics reflecting minority underrepresentation in the

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disproportionate impact on minorities", because "a showing of discriminatory purpose was not required in Title VII suits." *United States v. City of Chicago, supra*, 573 F.2d at 421.

[7] *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (herein "Croson") ("conclusionary" statement that an affirmative action plan is "remedial" or that racial discrimination still plagues municipal projects "are of little probative value in establishing identified discrimination. . . .").

ranks of the CFD [as] provid[ing] the strongest evidence of past discrimination." (Pet. App. 42a, 95a). However, when the affirmative action directives were promulgated in June and July, 1987, the City did not rely on pertinent inter-rank statistical comparisons, i.e., firefighter/engineer, lieutenant/captain. Rather, the correspondence from Personnel Commissioner Hoskins to Fire Commissioner Galante perceived a disparity between the uniformed ranks of the CFD and "1980 census workforce availability figures":

> Third, wholly apart from our consent decree and contractual obligations to practice affirmative action, our own commitment as an equal opportunity/affirmative action employer requires our adoption of reasonable affirmative action measures to remedy the effects of past discrimination. Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. *Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, respectfully, of each rank in the promotional sequence.* The actual utilization figures demonstrate a severe underutilization.
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> The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. * * * This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate. (Resp. App. 9a-10a, 16a-17a; emphasis added.)

Respondents, in opposing the City's motion for summary judgment in the district court, argued that the City's reliance on general labor market statistics was misplaced,

and that a more refined statistical comparison was required before the City could impose an affirmative action plan. (R. 75: Memorandum in Opposition to City's Motion for Summary Judgment, pp. 19-24.)[8] The district court agreed with this proposition, in part, declaring that "[i]n this case comparisons to the general labor population in Chicago are inappropriate." (Pet. App. 96a.)

However, alerted by the arguments in Respondents brief in opposition to summary judgment that statistical comparisons to the Chicago labor market were inapposite, the City's reply memorandum was accompanied by a supplemental affidavit of Deputy Commissioner of Personnel Robert Joyce; based on a statisitcal survey he had recently conducted (i.e., in the fall of 1989), Mr. Joyce determined that as of June, 1987, there existed a "disparity between the minority composition of the fire captain rank and that of fire lieutenants, and [a] disparity between the minority composition of the engineer rank and that of firefighters. . . ." (R. 80: Joyce Supp. Aff. ¶ 1; Pet. App. 43a, 97a.) These differences between the "expected" percentage of minorities in the ranks of engineer and captain, based on the "observed" percentage of minorities in the ranks of firefighter and lieutenant, re-

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[8] *Croson, supra,* 488 U.S. at 501-02, 504 ("where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task," and past discrimination, whether identified in this manner or otherwise, must be done "before" the public body "may use race-conscious relief"); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 308 n.13 (1977) ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."); *see also Janowiak v. Corporate City of South Bend,* 836 F.2d 1034, 1039-40 (7th Cir. 1987) (fire department's affirmative action hiring plan struck down on statutory and constitutional grounds "because the statistical comparison upon which the city based its plan focused not on the relevant qualified labor pool but on general population statistics"), *cert. denied,* 489 U.S. 1051 (1989).

spectively, were, in Joyce's opinion, "well beyond the possible effect of chance." (*Id.*, Supp. Aff. ¶ 2.)

For the district court and the Court of Appeals panel, the opinions expressed in the supplemental affidavit were "compelling." (Pet. App. 50a, 98a.) The data contained in the belated statistical analysis, measured under standard deviation theory, was deemed "sufficient to support an inference of discrimination," (Pet. App. 97a), and enough to satisfy the City's burden, as the proponent of the affirmative action plan, of demonstrating a " 'strong basis in evidence for its conclusion that' " [9] there had been discrimination in the past within the CFD, for which promotional quotas were considered the appropriate cure. (Pet. App. 41a-46a, 95a-98a, 100a.)

4. An additional rationale advanced by the City for the engineer promotional ratio was "that the 1985 Engineer examination had an adverse impact on minority candidates when used as a ranking device", because "the minority success rate of promotion was less than 80% of the white success rate of promotion. . . ." (Pet. App. 99a; Resp. App. 10a.) A firefighter's rank order standing on the engineer eligibility list was ultimately determined by the score attained in operating the fire engine simulator. (R. 76: Joyce Dep. 215, Ex. 6; Pet. App. 86a.) Although the results of the exhaustive validation study that the fire simulator had been put through by the City and the Department of Justice indicated that the simulator scores "could be satisfactorily used as a ranking device", (R. 76: Joyce Dep. 34-7, 40, 48-9), the City did a reversal of position in the courts below, claiming "that neither the practical nor written parts of the examination were properly validated as job related," and the engineer exam, "when used as a rank order device . . . was not (and could not have been) validated for rank order use." (Pet. App. 50a, 100a.)

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[9] *Croson*, 488 U.S. at 500, quoting *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (herein "*Wygant*").

C. The En Banc Decision

Judge Posner, who dissented from the panel's affirmance of the district court's judgment for Petitioners in the *Chicago Fire Firghters* case (Pet. App. 79a-83a), wrote for a five to four majority of the Court of Appeals in the proceedings en banc. (Pet. App. 1a-15a.) Having vacated the panel decision when rehearing en banc was granted, the Court of Appeals sitting en banc reversed the judgment of the district court, and remanded the case for trial.

Mindful that the entry of summary judgment under Rule 56(c), Fed. R. Civ. P., is proper only when "there is no genuine issue as to any material fact", Judge Posner's majority opinion found fault with the district court's expressions of certainty that promotional quotas were justified in 1987, given the state of the record compiled in the summary judgment proceeding:

> The objectionable hiring practices were, however, eliminated by a consent decree entered in 1974 in a suit against the city brought by the Department of Justice. Promotions were the subject of a separate consent decree, entered in 1980. . . . This decree required the fire department to compile new eligibility lists on the basis of new tests properly validated as fair to minorities, and in promoting from the old lists to engineer or lieutenant to promote one black or Hispanic for every four whites who were promoted.
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> That the city was determined to achieve or exceed its new goal of 25 percent minority promotions, regardless of what *any* test showed, is suggested by its insistence that "content validation" is not an adequate method of validating an employment test. * * * Now the city has backtracked, claiming that content validation is no good, and even suggesting that the fact that whites do better than others on a test proves that the test is biased even if it is validated. * * *

The city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination by departing from rank order fixed by non-biased tests. It will require a trial to determine whether this is in fact the city's motive in repudiating its own test.

* * * *

We come to the last set of promotions. Had the city promoted lieutenants to the rank of captain on the basis of the 1987 captains' eligibility list strictly on the basis of rank order, 5 out of 24 promotions, or 21 percent, would have been of minority candidates —all as it happened black. Apparently distressed that none of the successful candidates was Hispanic, the fire commissioner promoted a Hispanic lieutenant to captain out of rank order. The result was to increase the minority representation in the promotions from 21 to 25 percent. * * * [A] consequence of the very low hiring of minority firefighters before 1974 may have been that in the middle 1980s only a tiny fraction of captains consisted of blacks and Hispanics. From this is can be argued that racial discrimination in their favor was necessary to bring the percentage of captains from these groups nearer to where it would have been but for the discrimination that the groups had experienced many years earlier.

This of course is possible, but has not been shown, and in fact is unlikely. Recall that, so far as appears, the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that the discrimination was rectified in 1974. That the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between 1972 and 1974 is implausible. Of course it is possible that the city had been violating the Constitution . . . before 1972, by engaging in intentional discrimination in favor of whites. But of this there is no evidence.

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> Even disregarding these points, we note that, by 1987, 14 percent of the lieutenants in the fire department were black or Hispanic, and with a higher percentage of black and Hispanic lieutenants than this—21 percent—being promoted to captain without any "race-norming" or other discrimination in their favor on the captain's examination, there would in all likelihood soon have been a large percentage of minority captains even if promotions were made on a colorblind basis. The question becomes whether accelerating the process by departing from colorblind procedures was justifiable as a means for rectifying the discrimination in which the department may have engaged in the 1970s.
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> There is concern and resentment about the use of policies of . . . reverse discrimination to practice a form of racial politics. . . . * * * The Supreme Court in the *Croson* decision made clear that cities and states would have to furnish convincing evidence that their affirmative-action programs were not of this character but were instead sensitive, good-faith measures to remedy the unlawful practices in which they engaged in the past. The defendants have not shown this strongly enough to permit the dismissal of the plaintiffs' claims without a trial. (Pet. App. 6a, 10a-14a; emphasis in original.)

SUMMARY OF ARGUMENT

Petitioners have advanced no compelling reason why this Court should exercise its discretion and give plenary consideration to the interlocutory decision of the Court of Appeals, which overturned the district court's grant of summary judgment and remanded this case for trial. Moreover, the Court of Appeals was correct in its holding that municipalities must justify the use of racial quotas with a quantum of evidence that satisfies the strict scrutiny standard of the Equal Protection Clause of the Fourteenth Amendment.

1. The Court of Appeals held that the City did not meet its burden of establishing that the constitutionality of its preference for racial quotas, over validated promotional examinations, could be resolved as a matter of law through the procedural vehicle of a motion for summary judgment. Accordingly, the court reversed the district court's judgment and remanded this matter for a trial on the merits. Petitioners concede that this ruling is "interlocutory", Petition at 26, but nevertheless attempt to ignore the consequences of the procedural posture of the appeal. The strict scrutiny analysis that the City's race based quotas must pass, however, requires "searching judicial inquiry into the justification for such race-based measures . . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The Court of Appeals held that because the record showed there were a host of unanswered questions regarding the necessity of the extreme remedy of racial quotas, such an inquiry could not be resolved as a matter of law, a conclusion which hardly justifies this Court's review.

2. Moreover, the Court of Appeals correctly put the City to the task of justifying its preference for racial quotas over validated promotional exams on the basis of a compelling governmental interest, supported by evidence of "identified discrimination". The City attempts to divert analysis of its racial quotas by criticizing the Court of Appeals rejection of its proffered justifications. Ultimately, however, the City's attempt to obtain this Court's review is reduced to its admission that it cannot expect to secure evidence that it engaged in purposeful discrimination against minority fire fighters seeking promotions within the department. (Petition at 27.) This lack of justification for the use of racial quotas hardly justifies this Court's plenary consideration; it mandates, instead, the judicial rejection of the quotas.

REASONS FOR DENYING THE PETITION

I. BECAUSE THE COURT OF APPEALS REMANDED, THE CASE IS NOT RIPE FOR REVIEW BY THIS COURT

In *Croson,* 488 U.S. at 493, the Court held that all racial classifications, including those that are created by a municipality for ostensibly remedial purposes, are "highly suspect," and subject to a "strict scrutiny" standard of constitutional review. The very function of "strict scrutiny" is to insure that a solid "factual basis" exists for the suspect preferential treatment:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Id.*[10]

The Seventh Circuit's en banc decision has now concluded that the exacting scrutiny demanded by *Croson* was not adequately performed in the district court, because too many material questions of fact were left un-

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[10] These same considerations led the Court last Term to hold that allegations that a "State has created an unconstitutional racial gerrymander" are actionable under the Fourteenth Amendment: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno,* 61 U.S.L.W. 4818, 4820, 4826 (1993) (importing the *Croson* formula).

answered by the City.[11] Accordingly, the Court of Appeals has reversed the district court's grant of summary judgment, and has remanded the case for trial. In its present posture, then, Petitioners seek certiorari to review an interlocutory ruling. "However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court," and the petition for a writ of certiorari should be "denied." *Brotherhood of Loc. Firemen & Eng. v. Bangor & Aroostook, R. Co.*, 389 U.S. 327, 328 (1967) (per curiam), citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., Circuit Justice) ("[t]he policy against piecemeal interlocutory review other than as provided for by statutorily authorized appeals is a strong

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[11] Besides those mentioned in Judge Posner's majority opinion, additional fact issues remain for resolution on remand; *Croson* requires not only evidence of discrimination but also evidence of the scope of the injury caused by discrimination. 488 U.S. at 507, 510. With that in mind, in its Brief for the United States as *Amicus Curiae*, urging the Court of Appeals to reverse the district courts' judgments, the Department of Justice listed these as some of the issues of fact for disposition on remand: (i) to what extent, if any, have the promotional practices, challenged by the Department of Justice 20 years ago and which were remedied by the 1980 consent decree, persisted to cause injury; evidence will have to be elicited concerning the extent of the adverse impact of those challenged practices and the number of promotions made by the City on the basis of those practices; (ii) what was the extent of the injury caused by arguably discriminatory hiring practices, which the City claims still depresses the promotional ranks today, but that ended with a consent decree in 1974 requiring that 50% of new hires be minorities; (iii) why, in light of the preferences that the City has been affording to CFD minorities for at least 15 years, did the City not limit the promotional preferences to actual victims of past discrimination, as suggested in *Croson*, 488 U.S. at 508. *Amicus* Brief at 20-7. *See* Rosenblum, *Race-Conscious Employment Programs in the Post-Brennan Era: An End to Falsely Remedial Preferences?*, 28 Houston L. Rev. 993, 1056-58 (1991).

one"), citing, *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737 (1976).

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE CITY'S USE OF RACIAL QUOTAS MUST BE EXAMINED FURTHER TO DETERMINE WHETHER CONDITIONS IN THE CFD IN 1987 CONSTITUTED THAT EXTREME CASE WHERE, BECAUSE OF THE PERPETUATION OF PAST DISCRIMINATION, MINORITIES ARE STILL BEING SYSTEMATICALLY EXCLUDED FROM EMPLOYMENT OPPORTUNITIES

Petitioners, who argue that the "technically" interlocutory character of the en banc decision should be ignored, assert that the Court should exercise its discretion under Supreme Court Rule 10.1(a), and grant the writ because "[t]he Seventh Circuit's holdings that the Constitution forbids consideration of the consent decree and statistical evidence, and that the use of even a narrowly tailored promotional goal can be second guessed by a jury, are at odds with precedents of this Court, and flatly inconsistent with the law in other circuits." (Petition at 17.) As we discuss each of these points *seriatim,* it will become evident that Petitioners, in fashioning their arguments, have made a markedly circumscribed examination of the decisions of this Court in this developing area of the law.

1. According to Petitioners, "[t]he en banc majority held that the consent decree was wholly irrelevant to the City's permissible justifications for affirmative action; reliance on the decree would simply 'not be a defense.'" Petition at 18. The City argues that by virtue of the en banc decision it will be foreclosed from relying upon the consent decree as evidence of the continuing "effects of the City's prior discrimination on the composition of the upper ranks of the Fire Department. . . ." *Id.* at 17-8.

As we observed earlier in the Statement of the Case, *supra*, page 8, the City itself changed tack as far as what significance to attach to the 1980 consent decree. While Commissioner of Personnel Hoskins cited the consent decree as direct evidence of prior discrimination (Resp. App. 9a, 16a), the City did not contend in the district court or the Court of Appeals that the consent decree constituted evidence of past discrimination.[12] Rather, the City asserted that past discrimination could be inferred from the history of litigation in *United States v. City of Chicago*, 14 FEP Cases 882 (N.D. Ill. 1976), *reversed and remanded*, 573 F.2d 416 (7th Cir. 1978), leading to the entry of the consent decree. Respondents in *Chicago Fire Fighters* characterized that assertion as a "mere afterthought" because there was no evidence that the history of that litigation had been the subject of deliberations by Commissioner Hoskins or his cohorts "before" the decision to impose the quotas was made.[13]

The opinions of the district court (Pet. App. 90a-94a), and the Court of Appeals panel (Pet. App. 36a-41a), concentrated on the history of that litigation, taking exception with Respondents' contention "that the City's re-

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[12] The decree recognizes that the settlement does not constitute an admission by the City "nor is there to be any implication of an admission, that [the City] violated any provisions of Title VII of the Civil Rights Act. . . ." (Pet. App. 2a). Even absent this disclaimer, reliance upon the consent decree as proof, in-and-of-itself, of prior discrimination would run afoul of Fed. R. Evid. 408.

[13] "While the States and their subdivisions may take remedial action when they possess evidence . . . of prior discrimination, they must identify that discrimination, public or private, with some specificity *before* they may use race-conscious relief." *Croson*, 488 U.S. at 504 (emphasis supplied). As one commentator has noted: "The relevant inquiry, then, is the actual motivation of the legislature, not its *post hoc* rationalizations. * * * Indeed, a recurring problem in affirmative action litigation is that courts are 'presented with a series of *post hoc* arguments. . . .'" Cohen, *The Evidentiary Predicate for Affirmative Action after Croson: A Proposal for Shifting the Burdens of Proof*, 7 Yale L. & Policy Rev. 489, 514 (1989) (footnotes and citations omitted).

liance on the litigation history for its compelling interest is a 'mere afterthought.'" (Pet. App. 40a.) Although both of these since vacated decisions came to the conclusion that "the litigation history of the CFD's past hiring and promotion practices offers at least some evidence of past discrimination," (Pet. App. 38a-39a, 94a), neither court embraced the 1980 consent decree as probative evidence of past discrimination.[14]

Why Petitioners are roused to indignation over the en banc majority's similar reservations over the consent decree's probative value relative to past discrimination is particularly hard to fathom, because in his decision for the majority Judge Posner was willing to "assum[e] . . . that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980." (Pet. App. 6a; *see also,* Pet. App. 82a (Posner, J., dissenting).) At this juncture the en banc decision turns to the distinct "question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination." (Pet. App. 6a.) It is in this context that the Court of Appeals concludes that the 1980 consent decree had no bearing on whether

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[14] The Department of Justice, which had been invited by the Court of Appeals panel to submit a Brief as *Amicus Curiae* on whether "enforcement" of the 1980 consent decree "might be affected by the decision in these cases," responded as follows: "[T]he City may not rely on the consent decree as an independent justification for its actions. Because the long-term goal authorizes only race-conscious action that satisfies constitutional standards, the City's actions must stand or fall on their own merits." *Amicus* Brief at 15. *See Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1501 n.25 (11th Cir. 1987) (a consent decree "must be considered equivalent to a voluntary affirmative action plan for purposes of equal protection analysis," *citing, Wygant*), *aff'd sub nom., Martin v. Wilks*, 490 U.S. 755 (1989). Never alluding to the stance taken by the United States in its *amicus* brief, the City argues that it faces an untenable task: it must either comply with the consent decree (and risk a contempt citation if it fails to do so) or comply with the Constitution. (Petition at 22-3.)

the 25% promotional quotas were justifiable in 1987 and beyond: "Even if the measures had been required by the consent decree, which they were not . . . this would not be a defense." *Id.*

Petitioners fail to appreciate that these latter comments in the en banc opinion are directed as much toward *Croson*'s "narrowly tailored" prong, which requires "[p]roper findings . . . to define both the scope of the injury and the extent of the remedy necessary to cure its effects," 488 U.S. at 510 (O'Connor, J., plurality opinion), as to the "compelling interest" prong of the *Crosson* test, which requires a "strong basis in evidence" of past discrimination, 488 U.S. at 500. If conditions leading up to the 1980 consent decree made the incorporation of a 20% promotional quota appropriate at that time—and those preferences applied only to the 1979 lieutenant and the 1979 engineer promotion lists—the imposition of even more stringent promotional quotas (25%) seven years later, in 1987, was by no means foreordained. "[P]references may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own." *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir. 1993), *citing, United States v. Paradise,* 480 U.S. 149, 178-79 (1987); *compare, Wygant, supra,* 476 U.S. at 276 (Powell, J. plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

Furthermore, the observation made in the majority opinion that "plaintiffs were not parties to the decree," (Pet. App. 6a), is a telling reason for not allowing the 1987 quotas to be piggybacked onto the 1980 consent decree. If, as the City claims, the additional 1987 promotional quotas were imposed in deference to the 1980 consent decree, then the race-conscious remedy of the 1980 consent decree will take on a life of its own, with-

out ever being subject to the constitutional scrutiny now demanded by *Croson's* two pronged test. This is the point made in *Donaghy v. City of Omaha,* 933 F.2d 1448 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 938 (1992).

In *Donaghy,* a 1980 consent decree set long term hiring and promotional goals along with interim numerical targets that were to be attained during the life of the decree. The plaintiff in *Donaghy* was passed over for promotion in 1988 as a result of the decree's interim quotas, and he brought a reverse discrimination action. 933 F.2d at 1453. The Eighth Circuit held that in accordance with *Martin v. Wilks,* 490 U.S. 755 (1989), the plaintiff, who had not been a party to the suit resulting in the consent decree, must be afforded "the opportunity to prove that race-conscious measures *taken pursuant to the consent decree were invalid because the consent decree* (1) did not serve a remedial purpose, or (2) was not tailored narrowly enough." 933 F.2d at 1458 (emphasis added). Unlike *Donaghy,* where the plaintiff "was not foreclosed from" challenging the consent decree, *id.,* here, the City demands the absolute right to rely upon the 1980 consent decree to justify the 1987 promotional quotas, notwithstanding the fact that the CFD decree has never been scrutinized under the *Croson* test, as it will now have to be on remand. Judge Posner's majority decision is faithful to *Croson* and *Martin v. Wilks,* by refusing to accede to the preclusive effect that Petitioners wish to confer on the 1980 consent decree.

2. The second question Petitioners present for review is: "Whether a public employer may consider statistical evidence of a manifest racial imbalance in its workforce in assessing whether it has engaged in unconstitutional discrimination that may be redressed by race-conscious affirmative action." The City has once again altered the position it took in the courts below, where it contended not that it was confronted by a "manifest racial imbalance," but that "minority underrepresentation in the rele-

vant ranks of the CFD," constituted "compelling statistical evidence of past discrimination. . . ." (Pet. App. 41a, 98a). Framing the issue in terms of a "manifest racial imbalance" is hardly an innocuous turn of a phrase.

The Court has sustained affirmative action plans on account of a "manifest racial imbalance in traditionally segregated job categories" only when those plans have been challenged in reverse discrimination actions brought under Title VII. *United Steelworkers v. Weber,* 443 U.S. 193, 197 (1979); *Johnson v. Transportation Agency, Santa Clara,* 480 U.S. 616, 630 (1987) ("*Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part. * * * Rather, it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories;") (citations omitted). When an affirmative action plan is challenged on constitutional grounds, as is the case here, the manifest imbalance test is wholly inappropriate, as Justice Brennan acknowledged in *Johnson.* 480 U.S. at 620 n.2, 630 n.8, 633 nn.10, 11.[15]

Semantics aside, Petitioners' critique of the en banc majority's treatment of the statistical record is unconvincing. To begin with, the City's contention that "the majority rejected the City's statistical evidence in its entirety . . . by holding that only evidence of 'actionable discrimination' will do, and that the proffered statistics were

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[15] The holdings in *Weber* and *Johnson,* which are based on finding of manifest imbalance, ulimately rest on the concept of "societal discrimination," a rationale which carries no weight in a constitutional challenge to an affirmative action plan. *Croson,* 488 U.S. at 497; Rosenblum, *supra,* n.11 at 1006, 1022-24; *see also* Spencer, *When Preferential Hiring Becomes Reverse Discrimination,* 14 Employee Relations L.J. 513, 523 (1989) ("[U]nder the Constitution, the test for affirmative action is not 'manifest imbalance' but a 'strong basis in evidence for believing that remedial action was required.' ").

'no evidence' of unconstitutional pre-1972 discrimination," Petition at 25, misstates the en banc decision. The majority viewed it as "implausible" that "the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between 1972 and 1974," i.e., the 2 year period between the date Title VII became effective as to the City and the date the City entered into the 1974 consent decree calling for 50% minority hiring. (Pet. App. 12a-13a.) But Judge Posner then opined that "it is possible that the city had been violating the Constitution . . . before 1972, by engaging in intentional discrimination. . . . [b]ut of this there is no evidence." (*Id.*)[16] Presumably, if the City can muster competent evidence of either post-1972 statutory violations or pre-1972 constitutional violations, these will be among the issues that will "requir[e] further exploration" on remand. (*Id.* at 13a.)[17]

Furthermore, any statistical analysis the City might present on remand must be far more finely tuned than the confusing array of statistics the City presented in the original proceeding in the district court. *See* Statement of the Case, *supra*, at 10-12. This proposition—which is implicit in the majority's insistence that the City offer

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[16] *Accord United States v. City of Chicago, supra*, n.6, 14 FEP Cases at 884 (holding that Department of Justice failed to show a discriminatory intent in CFD employment practices and that workforce statistics did not give rise to an inference of constitutional violations), *rev'd on other grounds, United States v. City of Chicago, supra*, 573 F.2d at 421.

[17] Petitioners' argument that the opinion en banc was wrong for rejecting inferences of statistical evidence resulting from "non-actionable discrimination," is disposed of by *Hazelwood School Dist. v. United States, supra*, 433 U.S. at 309-10, in which the Court upheld a public employer's defense that "statistical workforce disparities," even where due to the "purposeful[] exclu[sion]" of minorities prior to Title VII's effective date of March 24, 1972, did not amount to post-Act discrimination.

meaningful explanations of statistical disparities [18]—was made explicit in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

In *Wards Cove*, the Court held that the party seeking to establish that employment practices have had a disparate impact on minorities "must go[] beyond . . . show-[ing] that there are statistical disparities in the employer's work force," and is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* at 656, *citing*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J., concurring). Consequently, a complained of disparity must be shown to be "the result of one or more of the employment practices" under challenge, accompanied by a "showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and non-whites." 490 U.S. at 657. Harking back to the observation in *Watson* "that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures," 487 U.S. at 992, Justice White explained in *Wards Cove* that the "specific causation requirement" recognizes that a " 'myriad of innocent causes . . . may lead to statistical imbalances in the composition of . . . work forces.' " 490 U.S. at 657, citing, *Watson*. To provide a sound

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[18] To cite one example proffered by the majority opinion: ". . . the disparity between the percentage of minority firefighters (29) and the percentage of minority engineers (11) . . . . by itself proves little," because "the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 per-cent minority hiring quota fixed in the 1974 consent decree." (Pet. App. 11a.) *Cf. Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 66 (5th Cir. 1990) (a bare statistical comparison does not suffice, as a "complete picture of the Fire Department's personnel makeup and a systematic analysis of the racial effects of all the promotional criteria for each rank are required").

basis for remedial action, statistics must demonstrate that identified discrimination caused work force disparities.[19]

The *Wards Cove test,* which is "an integral part of the plaintiff's prima facie case in a disparate impact suit under Title VII," *id.* at 657, is logically an integral part of the burden that a public employer, the proponent of an affirmative action plan in a reverse discrimination context, must assume if it seeks to justify the race-conscious remedy by reliance upon statistical work force disparities. *Cf. Croson,* 488 U.S. at 500 ("There is nothing approaching a prima facie case of a constitutional or statutory violation. . . ."). [20] Without a more insightful explanation of how particular discriminatory practices caused work force disparities to persist, the affirmative action plan cannot survive strict scrutiny, because a showing of "[r]acial imbalance in one segment of an employer's workforce does not, without more, establish a prima facie case of disparate impact for the employer's other positions. . . ." *Wards Cove,* 490 U.S. at 653; *Maryland Troopers Ass'n v. Evans, supra,* 933 F.2d at 1077 (ab-

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[19] Multiple regression analysis is a statistical tool that may satisfy the causality requireemnt of *Wards Cove. See Long v. City of Saginaw,* 911 F.2d 1192, 1199-1200 (6th Cir. 1990); Rosenblum, *supra,* n.11 at 1058-59; *Cf.* Pet. App. 98a (the district court suggested that the City's "statistics are too simplistic, as they contain only one independent variable: race," and posited (erroneously under *Croson, Wards Cove* and the en banc decision), that plaintiffs must shoulder the burden of conducting such an analysis). Multiple regression "measures the discrete influence independent variables have on a dependent variable. . . . Typically the independent variables will be race, age, education level, and experience levels." *Segar v. Smith,* 738 F.2d 1249, 1261 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985); *Bazemore v. Friday,* 478 U.S. 385, 400 (1986).

[20] *See* Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality,* 87 Mich. L. Rev. 1729, 1764-65, 1768 (1989) (*Croson* "imposes a very high threshold for proof of causal connection"); Marshall, *Causation in Employment Discrimination Analysis: A Proposed Marriage of the Croson and Wards Cove Rationales,* 20 Univ. of Maryland L. Rev. 307, 362-66 (1991).

sent corroboration, in the form of "significant anecdotal evidence of racial discrimination," court rejects racial hiring and promotional preferences justified solely by statistical disparities, *citing, International Bhd. of Teamsters v. United States,* 431 U.S. 324, 338 (1977)).

Lamenting the fact that the en banc decision will require them to do more on remand than simply offer undifferentiated satistics, Petitioners suggest that they may not be successful in eliciting this type of explanatory evidence. (Petition at 27.) If that is the case, this may be a fatal admission by the City that it cannot satisfy the *Wards Cove* requirement of proof of a causal connection between identified employment practices (e.g., hiring, testing) and work force disparity. 490 U.S. at 657. That is reason enough why the writ should not be granted.

3. Lastly, Petitioners claim that "the majority below held that because the promotional examinations were content valid, the lists they produced had to be used in rank order regardless of whether strict rank order use could also be validated," and, Petitioners argue, because that conclusion is inconsistent with decisions in the Second and Ninth Circuits "which have upheld departures from strict rank order use of content-valid promotional exams," the Court should grant the writ. (Petition at 28.) Once again, this does not fairly represent the holding of the Court of Appeals. Taking note of the City's reversal of positions with respect to the content validity of the engineer's exam, Judge Posner observed that "[t]he city's grounds for rejecting the results of its tests sound like pretexts designed to give the city more freedom to practice . . . discrimination by departing from rank order fixed by nonbiased tests." (Pet. App. 11a.) However, the majority was willing to give the City another chance to prove at trial precisely what caused the City to reject the engineer simulator test: was the test rejected because it was "unconsciously, biased in favor of

whites," or because of a fixation with quotas for their own sake? (Pet. App. 10a-11a.)[21]

The en banc decision is entirely consistent with *Croson*, in which the Court emphasized that a public employer must "narrowly tailor[]" any affirmative action plan, and the starting point of that inquiry is whether the public entity "considered any alternatives to a race-based quota." 488 U.S. at 507. Save for a perfunctory statement in the affirmative action correspondence that quotas alone were feasible,[22] there is no evidence, and a material issue of fact exists, as to whether City officials, in the closed door meetings where the CFD quota system was hatched, ever "carefully examined" any alternatives to quotas. *Id.*

As the record now stands, then, the City rushed to judgment when it imposed the 25% quotas, notwithstanding the admonition in *Croson* that this most extraordinary of remedies is reserved for the "extreme case" and should only be utilized when "necessary to break down patterns of deliberate exclusion." 488 U.S. 509 (O'Connor, J., plurality opinion); *see also, United States v. Paradise, supra,* 480 U.S. at 196-97, 200 (O'Connor, J., dissenting).

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[21] Recall too that when the promotional quotas were adopted in 1987, the City was all too ready to justify them because the percentage of minority engineers and captains did not compare favorably to the percentage of minorities in the general labor population in Chicago. (Pet. App. 96a.) Needless to say, this Court's admonition 10 years earlier in *Hazelwood,* 433 U.S. at 308 n.13, that comparisons to the general population are meaningless when the jobs at issue require special qualifications, went unheeded by City officials, including the attorney in the Corporation Counsel's office who drafted the affirmative action directives bearing Commissioner Hoskins' signature. (R. 76: Joyce Dep. 222-24.)

[22] *See Wygant,* 476 U.S. at 278 n.5 (public employers' concession, "now that it is in their interest to make such a concession" that they had "discriminated in the past," lacks probative value).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari, submitted on behalf of the City of Chicago and certain of its officials, should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 661
No. 80 C 1590

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICHARD G. ALBRECHT, Commissioner, City of Chicago Fire Department, *et al.*,
Defendants.

ORDER OF SETTLEMENT

On March 31, 1980, the United States, by the Attorney General, filed the complaint in this action alleging that the promotional practices and procedures followed with respect to the City of Chicago Fire Department violated the prohibitions against discrimination on the basis of race and national origin of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. §§ 2000e, *et seq.*) The complaint alleges that the victims of the defendants' unlawful discrimination are blacks and Hispanics seeking promotion within the Fire Department. The plaintiff and defendants, with and through their counsel, have met and conferred with regard to these allegations and have concluded that the litigation of the action is not in the best interest of any party or the commonly agreed to objective of increasing the promotional and other employment opportunities of blacks and Hispanics within the City of Chicago Fire Department.

Accordingly, the plaintiff and the defendants have presented this Order of Settlement to the Court for entry in full resolution of this action and of the promotional issues raised in a previously filed action, *United States* v. *City of Chicago, et al.* (Civil Action No. 73-C-661), now pending appeal. By so doing, the defendants do not admit, nor is there to be any implication of an admission, that they or any of them have violated any provisions of Title VII of the Civil Rights Act of 1964, as amended.

The Court finds that this Order of Settlement and its entry are lawful under, consistent with, and will further the purposes and objectives of Title VII of the Civil Rights Act of 1964, as amended, and therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants, Richard G. Albrecht, Commisisoner, City of Chicago Fire Department, *et al.*, and each of them, their officers, officials, agents, employees, successors in office, and all persons or organizations in active concert or participation with them shall be and remain permanently enjoined and restrained from discriminating against any applicant or candidate for promotion to, or holder of, any rank within the City of Chicago Fire Department above the entry level rank of Firefighter on the basis of race or national origin and from failing or refusing to fully comply with and implement the provisions of this Order.

1. *Long Range Promotional Goal.* The defendants, as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks of the City of Chicago Fire Department with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

2. *The 1979 Engineer and Lieutenant Eligibility Lists.*

A. Defendants may continue to make operational use of the 1979 Engineer Eligibility List and the 1979 Lieutenant Eligibility List for purposes of rank order promotions therefrom, provided that if the defendants determine that the needs of the City of Chicago require further promotions be made beyond number 213 on the 1979 Engineer List and/or number 113 on the 1979 Lieutenant List prior to the development of new lists in conformity with paragraph 3 below, such further promotions from the 1979 Engineer and Lieutenant Lists shall be made such that one black or Hispanic Firefighter shall be promoted for every four white Firefighters promoted.

B. If necessary to meet the obligations imposed by paragraphs 2(A) above, the 1979 Engineer and Lieutenant Eligibility Lists shall be expanded by reducing the cut off score from 70, provided that any such reduction in a cut off score need not exceed one standard deviation below the mean score obtained by black and Hispanic candidates as a group on the test involved.

C. Once a new Engineer or Lieutenant eligibility list is developed pursuant to and in conformity with the requirements of paragraph 3 below, the corresponding 1979 list shall be stricken and used no further.

3. *Future Promotional Eligibility Lists.*

A. The defendants shall proceed to undertake to compile new promotional eligibility lists, subject to the conditions and limitations set forth in paragraphs 3(B) through 3(E) below.

B. Such new eligibility lists and/or the promotions made therefrom shall be consistent with the long term goal for the promotion of blacks and Hispanics within the City of Chicago Fire Department set forth in paragraph 1 above.

C. Any qualifications, tests or other selection standards or procedures for promotion in the City of Chicago Fire Department that the defendants may use or adopt shall be designed so as to eliminate or reduce any adverse impact against black or Hispanic applicants for promotion, and otherwise shall be consistent with the standards and requirements of the *Uniform Guidelines on Employee Selection Procedures,* 43 Fed. Reg. 38290.

D. Any qualifications, tests or other selection standards or procedures for promotion in the City of Chicago Fire Department which are used or adopted by the Defendants shall be sufficiently objective to prevent, or otherwise shall be designed to ensure against, any unlawful discrimination against blacks and Hispanics seeking promotion. In this regard, the defendants shall apply statistical tests to, and otherwise conduct analyses of, the various data generated in the course of compiling the 1979 Engineer and Lieutenant Eligibility Lists, for the purposes of better understanding, eliminating, and correcting for any unlawful discrimination against blacks and Hispanics. Such tests and analyses shall be conducted in cooperation and coordination with the plaintiff, and the plaintiff shall be kept fully informed by written reports of the progress and results of such tests and analyses.

E. Training opportunities shall be provided to personnel within the City of Chicago Fire Department who desire to seek promotions within the department. Such training opportunities shall be provided prior to the initiation of any promotional selection procedures and they shall be appropriate to the rank involved.

4. *Regular Reports.* For each six month period ending June 30 or December 31, the following reports shall be served on the United States within 30 days of the close of the reporting period:

A. Eligibility Lists. A copy of each promotional eligibility list in effect during the reporting period, with the

name, race or national origin, service date, and final score, in rank order, of all candidates. Such lists shall be updated with each report to reflect cumulatively:

1. Candidates promoted and date of promotion.

2. Candidates passed over or rejected for promotion to the rank in question, the dates of such pass overs or rejections, and the reasons for each.

3. Candidates expected to be promoted within the next six months.

B. *Validation Efforts.* In addition to the reports called for by paragraph 3(D) above, which shall be made whenever appropriate under that paragraph, a progress report or detailed summary shall be provided of all efforts made and results obtained in compliance with paragraphs 3(A) through 3(E) above. Each report or summary shall include:

1. A description of the qualification, test or other selection standard or procedure and the study or other action undertaken in connection with it.

2. A description of each of the steps taken to comply with the standards for validation of qualifications, tests or other selection standards or procedures as set forth in the *Uniform Guidelines on Employee Selection Procedures,* especially those standards contained in sections 14 and 15 of the Guidelines.

5. *Special Reports.* The following reports shall be due within the time periods indicated:

A. *Proposed Striking of Promotional Eligibility Lists.* At least 60 days in advance of the striking of any City of Chicago Fire Department promotional eligibility list a copy of that list, updated to conform with paragraphs 4(A)(1) and (2) above, shall be provided to the United States with an indication of the proposed date of striking

and the identification of any additional persons thereon expected to be promoted prior to the striking.

B. *Proposed Adoption of New Promotional Eligibility Lists.* At least 60 days in advance of the adoption of any new City of Chicago Fire Department promotional eligibility list, a copy of that list with race and ethnic identifications and statistical data on the pass/fail rates (percentages and absolute numbers by race or ethnic status) for each component or step of the selection process shall be provided to the United States. For each list submitted, all the current information on the projected duration of that list, the number of anticipated promotions to be made from it during each half year of that period, and an explanation as to how the list or its use will comply with the requirements of paragraph 1, above, shall also be provided. Should the United States have objection to any new promotional eligibility list or its proposed utilization, it shall file such objection with the Court within 45 days of its receipt of that list and, if the United States files such an objection, the list shall not become operational until approved by the Court. Until any such future promotional eligibility list is approved for operational use by the Court, or the United States has indicated to the defendants that it has no objection, or the 45-day period for objection has expired without the United States filing an objection, the contents of the list shall not be disclosed to any candidates thereon or otherwise made public by the defendants or any other party.

6. *Meetings of the Parties.* Upon reasonable notice of the plaintiff or any of the defendants, the parties and their counsel shall meet and confer about any matter concerning this Order or its implementation. The purpose of such meetings shall be to anticipate and avoid or resolve by agreement any future disputes which might arise. To that end, any party anticipating any dispute shall call for such a meeting.

7. *Obligation of the United States.* The United States agrees that the entry of this Order of Settlement shall serve not only to settle all issues raised in this present action, but shall also serve to finally resolve and settle all issues concerning promotional practices within the City of Chicago Fire Department raised in *United States* v. *City of Chicago*, Civil Action No. 73-C-661. Accordingly, the United States in No. 73-C-661 shall notify the United States Court of Appeals for the Seventh Circuit of the entry of this Order and move that Court for the entry of an order dismissing the appeal of the United States filed in No. 73-C-661.

The Court shall retain jurisdiction of this cause for purposes of entering any orders for enforcement or, in light of experience had under this Order, any orders of modification or amendment.

ORDERED this the 31st day of March, 1980.

/s/ Frank J. McGarr
United States District Judge

/s/ Canella E. Henrichs
CANELLA E. HENRICHS
Assistant United States
Attorney
for the United States

AGREED and CONSENTED to:

ROBERT T. MOORE
Attorney
Department of Justice
for the United States

/s/ Daniel Pascale
DANIEL PASCALE
Deputy Corporation Counsel
City of Chicago,
for all defendants

[City Seal]

CITY OF CHICAGO
Harold Washington, Mayor

DEPARTMENT OF PERSONNEL

Jesse E. Hoskins
Commissioner

Sam Ackerman
First Deputy Commissioner

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June 16, 1987

Louis Galante
Commissioner
Department of Fire
Room 105
121 North LaSalle Street
Chicago, Illinois 60602

Dear Commissioner Galante:

As we approach the third set of promotions from the Engineer Eligible List we have given consideration to the need to utilize an affirmative action promotion policy in making these and subsequent promotions from this list. For the reasons set forth below, it is our conclusion that promotions from this list should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic.

There are four independent reasons why affirmative action promotion ratios are warranted. First, we are under a continuing obligation to comply with the 1980 consent

decree signed by Judge McGarr. That decree requires the City to pursue a goal of promoting Blacks and Hispanics in sufficient numbers so as to increase substantially the minority compostion at each promotional rank, so that each rank will become more representative of the rank from which promotions are made. Currently, Blacks comprise 23.20% of Firefighters but only 9.46% of Engineers, and Hispanics comprise 5.70% of Firefighters but only 1.51% of Engineers. Based on these figures, it is the opinion of the Corporation Counsel that we would be in violation of the consent decree were we to adhere to strict rank order in making promotions to Engineer.

Second, pursuant to Appendix G of the collective bargaining agreement, we are required to follow promotion policies designed to achieve, as quickly as reasonably possible, a level as close as reasonably possible to 45% Black and Hispanic representation at each rank. With less than 11% Black and Hispanic representation at the rank of Engineer, we quite obviously have a very long way to go in meeting the 45% goal.

Third, wholly apart from our consent decree and contractual obligations to practice affirmative action, our own commitment as an equal opportunity/affirmative action employer requires our adoption of reasonable affirmative action measures to remedy the effects of past discrimination. Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, respectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a severe underutilization:

	Blacks	Hispanic
External Availability	approx. 35%	approx. 10%
Firefighters	23.20%	5.70%
Engineers	9.57%	1.51%
Lieutenants	10.4 %	3.1 %
Captains	2.10%	1.03%
Battalion Chiefs	1.01%	1.01%

The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is needed to correct the effects of such a long history of discrimination. Further affirmative action is therefore necessary.

The fourth reason we need to promote on an affirmative action basis is to avoid violating Title VII of the Civil Rights Act of 1964, as amended. An examination of the overall test scores (which weigh a written test, oral test and seniority factor) shows that the Engineer promotional procedure has an adverse impact on minorities when used as a ranking device. Further, based on your familiarity with both the testing procedure and the position of Engineer, you have expressed your belief that small differences in scores do not indicate any real difference in ability to perform the responsibilities of an Engineer. Under these circumstances, we would risk violating Title

VII were we to adhere to strict rank order in making promotions to Engineer. This, of course, would also constitute an additional violation of the 1980 Consent Decree.

For these four reasons, we believe that an affirmative action promotion policy is warranted. It is especially important that we pursue such a policy at the present time because of the unique opportunity we have in the short term future to integrate the promotional ranks while imposing the least burden on white firefighters. As you know, the upper ranks of the Fire Department include a large number of workers who are nearing retirement, making room for a larger than ordinary number of promotions from the lower ranks. This has two consequences. First, if we fail to pursue affirmative action in promotions during this period of substantial turnover we will again freeze in a pattern of having virtually all whites at the upper ranks. Second, the large number of promotional opportunities that will be available in the next few years will permit the promotion of a substantial number of Blacks and Hispanics without closing off promotional opportunities for other members of the Department. Thus this is a particularly appropriate time to pursue affirmative action.

In determining that promoiton ratios of 20% Black and 5% Hispanic should be used in making promotions to the rank of Engineer, a number of important considerations were taken into account. First, we selected a system of promotion ratios only after concluding that no other approach would permit meaningful affirmative action progress. Both by contract and as a result of the Department's operating needs, promotions to the rank of Engineer must be made from the rank of Firefighter, and by contract we must customarily promote in rank order. Thus this clearly is not a situation where a race-neutral approach such as aggressive outside recruitment could be used to achieve affirmative action goals.

Second, we considered the impact that these ratios would have on the promotional opportunities of other candi-

dates on the Engineer Eligible List. In view of the current severe underutilization at the rank of Engineer, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion.

Third, we also considered the qualifications of the individuals who will be promoted as a result of the affirmative action goals. First and foremost, no one will be promoted as a result of affirmative action unless that person has been shown to be qualified by virtue of achieving a passing score on the Engineer promotional exam procedure. Further, an examination of the rank order test scores shows that there will be no meaningful difference in test scores between those promoted as a result of affirmative action and those who would have been promoted were we to promote in strict rank order. Your Department has estimated that 300-350 Engineers will be promoted off the new Eligible List. Were we to promote 350 individuals in strict rank order, the lowest score achieved by a candidate obtaining promotion would be 84.8190. The 20%/5% Black/Hispanic goals can be satisfied without promoting anyone scoring lower than 78.9771. You have indicated that such a difference of less than 6 points on a 100 point scale does not indicate any real difference in qualifications for the position of Engineer.

Fourth, we took into account the racial composition of the pool of applicants for the position of Engineer. The 20% and 5% goals are slightly lower than the percentages of Blacks and Hispanics at the lower rank of Firefighter, and they are slightly lower than the percentages of Blacks and Hispanics who applied for the position of Engineer.

Next, we considered our obligations under the collective bargaining agreement. Under the Goldstein arbitration award, it is clear that the Department may use affirmative action as a basis for departing from strict rank order promotions.

Finally, we are aware that the Fire Department, like the Police Department, is a community service organization which needs the trust and cooperation of the community it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels.

For all these reasons we have determined that the 20% Black and 5% Hispanic promotion goals are both necessary and reasonable. Based on the composition of the Eligible List and current estimates of the number of Engineers to be promoted, we are confident, as noted above, that these goals can be met without promoting unqualified candidates. However, we emphasize that in no event should these ratios be applied if doing so would result in the promotion of an unqualified candidate.

We also wish to emphasize that these goals are temporary ones designed to remove the effects of past discrimination, not to maintain racial balance once the effects of past discrimination have been corrected. Given the present severe underutilization at the rank of Engineer, we anticipate that these goals will be appropriate for three years or until 350 promotions have been made off the new Engineer Eligible List, at which point we will reassess the situation completely. Moreover, to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action promotion goals will be reevaluated on an annual basis.

Please contact me if you have any questions or if you believe that additional considerations would warrant modification of the approach we have proposed.

Sincerely,

/s/ Jesse E. Hoskins
JESSE E. HOSKINS
Commissioner of Personnel

cc: Dobbins
Holewinski
Miner
Patch

JEH/RTJ/fc

[City Seal]

CITY OF CHICAGO
Harold Washington, Mayor

DEPARTMENT OF PERSONNEL

Jesse E. Hoskins
Commissioner

Sam Ackerman
First Deputy Commissioner

City Hall, Room 1100
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-4000

July 9, 1987

Louis Galante
Commissioner
Department of Fire
Room 105
121 North LaSalle Street
Chicago, Illinois 60602

Dear Commissioner Galante:

Attached for your information is the official new Fire Captain promotional Eligible List. We understand that your Department anticipates promoting approximately 150 Captains off of this list, assuminng that the list remains in use for three years. If these promotions were to be made in strict rank order, Blacks and Hispanics would receive, respectively, 14.0% and 4.7% of the promotions to Captain. Given our equal employment/ affirmative action obligations, we believe that these figures are too low. For the reasons set forth below, it is our conclusion that promotions from this list should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Captain would be Black

and an additional 5% of those promoted would be Hispanic.

There are three independent reasons why affirmative action promotion ratios are warranted. First, we are under a continuing obligation to comply with the 1980 consent decree signed by Judge McGarr. That decree requires the City to pursue a goal of promoting Blacks and Hispanics in sufficient numbers so as to increase substantially the minority composition at each promotional rank, so that each rank will become more representative of the rank from which promotions are made. Currently, only 3% of Captains are Black or Hispanic, whereas Blacks and Hispanics comprise 13.5% of Lieutenants and approximately 26% of Firefighters/Engineers (the two ranks eligible for promotion to Lieutenant). Based on these figures, it is the opinion of the Corporation Counsel that we would be in violation of the consent decree were we to adhere to strict rank order in making promotions to Captain.

Second, pursuant to Appendix G of the collective bargaining agreement, we are required to follow promotion policies designed to achieve, as quickly as reasonably possible, a level as close as reasonably possible to 45% Black and Hispanic representation at each rank. With only 3% Black and Hispanic representation at the rank of Captain, we quite obviously have a very long way to go in meeting the 45% goal.

Third, wholly apart from our consent decree and contractual obligations to practice affirmative action, our own commitment as an equal opportunity/affirmative action employer requires our adoption of reasonable affirmative action measures to remedy the effects of past discrimination. Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, re-

spectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a severe underutilization.

	Blacks	Hispanic
External Availability	approx 35%	approx. 10%
Firefighters	23.20%	5.70%
Engineers	9.46%	1.51%
Lieutenants	10.4 %	3.1 %
Captains	2.10%	1.03%
Battalion Chiefs	1.01%	1.01%

The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is needed to correct the effects of such a long history of discrimination.

For these three reasons, we believe that an affirmative action promotion policy is warranted. It is especially important that we pursue such a policy at the present time because of the unique opportunity we have in the short term future to integrate the promotional ranks while imposing the least burden on white firefighters.

As you know, the upper ranks of the Fire Department include a large number of older workers who are nearing retirement, making room for a larger than ordinary number of promotions from the lower ranks. This has two consequences. First, if we fail to pursue affirmative action in promotions during this period of substantial turnover we will again freeze in a pattern of having virtually all

whites at the upper ranks. Second, the large number of promotional opportunities that will be available in the next few years will permit the promotion of a substantial number of Blacks and Hispanics without closing off promotional opportunities for other members of the Department. Thus this is a particularly appropriate time to pursue affirmative action.

In determining that promotion ratios of 20% Black and 5% Hispanic should be used in making promotions to the rank of Captain, a number of important considerations were taken into account. First, we selected a system of promotion ratios only after concluding that no other approach would permit meaningful affirmative action progress. Both by contract and as a result of the Department's operating needs, promotions to the rank of Captain must be made from the rank of Lieutenant, and by contract we must customarily promote in rank order. Thus this clearly is not a situation where a race-neutral approach such as aggressive outside recruitment could be used to achieve affirmative action goals.

Second, we took into account the fact that the rank of Captain is a crucial rank for opening higher positions to minorities. Until we enlarge the pool of Black and Hispanic Captains we will be unable to even begin to make appreciable progress in integrating the rank of Battalion Chief, which remains virtually all white. Additionally, as you have noted, experience at the rank of Captain or Battalion Chief is an essential prerequisite for promotion to the exempt command positions such as Deputy District Chief or District Chief. Given our commitment to integrating the leadership positions in the Department, it is essential that minorities obtain experience at the rank of Captain. The 20% Black and 5% Hispanic goals will allow us to make moderate but meaningful progress.

Third, we considered the impact that these ratios would have on the promotional opportunities of other candidates on the Captain Eligible List. In view of the current

97% white composition of the rank of Captain, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion.

We also considered the qualifications of the individuals who will be promoted as a result of the affirmative action goals. First and foremost, no one will be promoted as a result of affirmative action unless that person has been shown to be qualified by virtue of achieving a passing score on the Captain promotional exam procedure, which weighs a written test, oral test and seniority factor. Further, an examination of the rank order test scores shows that there will be virtually no difference in test scores between those promoted as a result of affirmative action and those who would have been promoted were we to promote in strict rank order. Your Department has estimated that 150 Captains will be promoted off the new Eligible List. Were we to promote in strict rank order, the lowest score achieved by a candidate obtaining promotion would be 78.16. The 20%/5% Black/Hispanic goals can be satisfied without promoting anyone scoring lower than 76.82. Your Department has indicated that such a difference of less than 1.5 points on a 100 point scale does not indicate any real difference in qualifications for the position of Captain.

Next, we considered our obligations under the collective bargaining agreement. Under the Goldstein arbitration award, it is clear that the Department may use affirmative action as a basis for departing from strict rank order promotions.

Finally, we are aware that the Fire Department, like the Police Department, is a community service organization which needs the trust and cooperation of the community

it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels.

For all these reasons we have determined that the 20% Black and 5% Hispanic promotion goals are both necessary and reasonable. Based on the composition of the Eligible List and current estimates of the number of Captains to be promoted, we are confident, as noted above, that these goals can be met without promoting unqualified candidates. However, we emphasize that in no event should these ratios be applied if doing so would result in the promotion of an unqualified candidate.

We also wish to emphasize that these goals are temporary ones designed to remove the effects of past discrimination, not to maintain racial balance once the effects of past discrimination have been corrected. Given the present severe underutilization at the rank of Captain, we anticipate that these goals will be appropriate for three years or until 150 promotions have been made off the new Captain Eligible List, at which point we will reassess the situation completely. Moreover, to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action promotion goals will be reevaluated on an annual basis.

Please contact me if you have any questions or if you believe that additional considerations would warrant modification of the approach we have proposed.

Sincerely,

/s/ Jesse E. Hoskins
JESSIE E. HOSKINS
Commissioner of Personnel

cc: Dobbins
Holewinski
Miner
Patch

JEH/RTJ/dvm

CHICAGO FIRE DEPARTMENT CENSUS

AUGUST 1979:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	99	0	1	1.01%
Captain	218	12	1	5.96%
Lieutenant	623	16	2	2.88%
Engineer	366	13	1	3.82%
Fire Fighter	2727	338	50	14.22%

MAY 17, 1983:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	109	0	0	0.0 %
Captain	206	8	2	4.85%
Lieutenant	743	50	13	8.47%
Engineer	553	48	7	9.94%
Fire Fighter	2927	575	123	23.84%

DECEMBER 31, 1986:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	101	2	1	2.88%
Captain	181	4	3	3.86%
Lieutenat	625	63	18	12.96%
Engineer	470	45	8	11.27%
Fire Fighter	2694	620	152	28.65%

June 30, 1987:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	97	1	1	2.06%
Captain	194	5	2	3.60%
Lieutenant	646	68	20	13.62%
Engineer	464	44	7	10.99%
Fire Fighter	2739	638	161	29.17%

(R.79: Undisputed Facts ¶ 4; R.71: Cole Aff. ¶ 12; R.76: PX 1.)

No. 93-4

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,
v.
EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,
v.
CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL WOMEN'S LAW CENTER, WOMEN EMPLOYED, THE WOMEN'S LEGAL DEFENSE FUND, THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, THE CHICAGO AFRICAN-AMERICAN FIREFIGHTERS LEAGUE, THE CHICAGO COUNCIL OF LAWYERS, CHICAGO WOMEN IN TRADES, THE LATINO FIREFIGHTERS ASSOCIATION OF CHICAGO, AND THE NAACP CHICAGO SOUTH SIDE BRANCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner City of Chicago has consented to the filing of the brief. This motion is necessary because the respondents have denied consent.

The *amici,* national and local organizations whose members are active in efforts to protect the civil rights of people who historically have been victimized by dis-

crimination, have a strong interest in legal issues affecting equal employment opportunities and in rectifying past discrimination in this country through voluntary affirmative action by private employers and governmental entities.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Lawyers Committee") is a non-profit legal advocacy organization founded in 1969. Since its inception, the Lawyers' Committee has enlisted the *pro bono* services of many hundreds of attorneys from Chicago law firms in addressing a wide range of legal problems, including employment discrimination. The Lawyers' Committee has strong interest in seeing racial discrimination eliminated and, where appropriate, remedied with affirmative action efforts.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national non-profit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It has frequently represented plaintiffs and intervenors in employment discrimination matters raising affirmative action issues, and has appeared as an *amicus* in federal courts, including cases before this Court.

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make the goal of equal opportunity for women in the workplace a reality. The implementation of remedial efforts by employers to rectify prior discrimination is essential to this goal. Consequently, the Center has a deep and abiding interest in ensuring that voluntary and appropriate affirmative action plans are adequately protected under the law.

Women Employed is a national membership association of 2,000 working women based in Chicago. Since 1973,

the organization has assisted thousands of working women with sex discrimination problems, monitored the performance of equal opportunity enforcement agencies, and developed proposals for improving enforcement efforts. Women Employed has found affirmative action measures to be a necessary tool in remedying sex discrimination.

The Women's Legal Defense Fund ("WLDF") is a non-profit national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender.

The American Civil Liberties Union of Illinois ("ACLU") is a statewide, non-profit, nonparitsan organization of nearly 14,000 members. It is an affiliate of its national parent organization, the American Civil Liberties Union. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws.

The Chicago African-American Firefighters League was established in 1967 to improve the professional competency of firefighters and to promote justice for its membership. The League has been actively involved in employment discrimination litigation and the enforcement of consent decrees aimed at desegregation of the fire service. The League is concerned that the overly restrictive interpretation of the consent decree in this case will negatively affect strides achieved by minorities in the 1980s.

The Chicago Council of Lawyers ("Council") is a public interest bar association of more than 1,200 members.

It was founded in 1969 to work toward a system of justice that is fair to all. The Council evaluates state and federal judges, files briefs *amicus curiae* in cases affecting the public interest, authors publications to educate lawyers and the public at large about our legal system, and issues recommendations for improving the ways in which courts and government agencies operate.

Chicago Women in Trades ("CWIT") is an organization that assists tradeswomen and women seeking entry into nontraditional blue-collar employment. CWIT works to increase the number of women in the trades, and advocates for equal employment opportunities. CWIT has found affirmative action measures to be a necessary remedy for many women in nontraditional jobs who have long been victims of gender discrimination.

The Latino Firefighters Association of Chicago seeks to ensure that Latino firefighters are provided equal employment opportunities. The Association believes that measures taken to ameliorate prior discriminatory practices are a vital means for achieving equal employment, and therefore has a strong interest in the continued viability of legitimate affirmative action undertaken by employers.

The NAACP Chicago South Side Branch is a branch of the National Association for the Advancement of Colored People ("NAACP"), the nation's oldest and largest civil rights organization. The NAACP was established in 1909 to empower and protect African-Americans and other minorities under the Constitution through principles of equal justice under law. The NAACP has been instrumental in securing passage of all civil rights legislation in this century, and remains committed to the full enforcement of these laws.

This case is of great interest to *amici* because the decision of the United States Court of Appeals for the Seventh Circuit in *City of Chicago v. Billish*, 989 F.2d 890 (7th Cir. 1993) (en banc), seriously impairs an employer's ability to engage in voluntary remedial efforts to eradicate past discrimination. A decision, like the one

below, that increases the vulnerability of consent decrees and creates unrealistic evidentiary hurdles for employers seeking to implement necessary remedial measures will limit the employment opportunities available to women and non-whites in this country.

Many of the *amici* organizations have been litigating against employment discrimination for many decades, and seek to ensure that work forces, both public and private, end discriminatory practices and rectify prior discrimination. Voluntary affirmative action will be significantly impeded if employers must satisfy the rigid, extraordinary strictures established by the en banc Seventh Circuit in this case.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and because *amici*'s perspective may help illuminate the significant and disturbing implications of the court of appeals' decision, *amici* respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted,

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August 18, 1993

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

**BRIEF OF
THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.,
THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND,
THE NATIONAL WOMEN'S LAW CENTER,
WOMEN EMPLOYED,
THE WOMEN'S LEGAL DEFENSE FUND,
THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS,
THE CHICAGO AFRICAN-AMERICAN FIREFIGHTERS LEAGUE,
THE CHICAGO COUNCIL OF LAWYERS,
CHICAGO WOMEN IN TRADES,
THE LATINO FIREFIGHTERS ASSOCIATION OF CHICAGO, AND
THE NAACP CHICAGO SOUTH SIDE BRANCH
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

INTRODUCTION

In holding that the City of Chicago must go to trial to defend measures undertaken to remedy prior discrimination, the en banc Seventh Circuit, in a 5-4 decision, refused to consider critical evidence offered by the City. The court's stated rationales for disregarding the City's evidence—which included significant statistical racial disparities among the ranks in the Chicago Fire Department ("CFD") and a consent decree with the United States Department of Justice ("DOJ")—are contrary to the decisions of this Court and the law in other circuits. The decision below will create prohibitive obstacles for employers embarked on affirmative action as a remedy for prior discrimination and will dissuade others from even trying to foster inclusion of minorities and women in work forces from which they historically have been excluded.

Discrimination in fire and police departments, such as that documented on the part of the City of Chicago, is a deeply entrenched practice nationwide. A study by the United States Commission on Civil Rights in 1969, the very era in which the City's discriminatory policies were first challenged by the DOJ, revealed rampant discrimination by cities, particularly in fire and police departments: "Barriers to equal employment are greater in police and fire departments than in any other area of state and local government." *United States v. City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980) (quoting U.S. Commision on Civil Rights, "For all the people . . . By all the people," 119-20 (1969)). According to the study, fire and police departments engaged in exclusionary practices ranging from recruitment to on-the-job harassment:

> Negroes are not employed in significant numbers in police and fire departments. . . . Negro policemen and firemen hold almost no positions in the officer ranks. . . . Police and fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers. Minority group hostility to police and fire departments also deters recruitment, and this has not been overcome by the departments.

Id.

All public employers play a unique role in the eradication of discrimination. As the Mayor of Birmingham recognized in his testimony on the Civil Rights Act of 1990, "[e]radication of discrimination in the public sector is of special importance, both because discrimination in the public sector impugns a government's intent and ability to represent all citizens, and because elimination of discrimination in the public sector fosters the elimination of discrimination in the private sector." *The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the House Comm. on Education and Labor and the Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights*, 101st Cong., 2d Sess. 286-87 (statement of Richard Arrington, Jr.) (citing H.R. 92-238, 2 U.S. Code Cong. & Admin. News 2137, 2152-54, 2157-60 (1972) (legislative history of 1972 amendment that brought public employers within coverage of Title VII)). The decision below rebukes such efforts, by imposing standards that go well beyond those required by this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Seventh Circuit's decision undercuts the ability of all employers to engage in remedial efforts to ameliorate prior discrimination, and creates disincentives to settlement of employment discrimination litigation. Its effect

will be to discourage employers from voluntarily remedying prior discrimination. The majority opinion is a serious setback to civil rights organizations that have worked to vindicate the rights of people who historically have been harmed by discriminatory practices.

ARGUMENT

I. EMPLOYERS WILL BE DISSUADED FROM VOLUNTARILY REMEDYING PRIOR DISCRIMINATION IF THEY CANNOT RELY ON STATISTICALLY SIGNIFICANT RACIAL DISPARITIES AS A BASIS FOR IMPLEMENTING REMEDIAL MEASURES.

A public employer need not prove a case of intentional discrimination against itself in order to withstand constitutional scrutiny of its affirmative action efforts. Yet that is what the en banc Seventh Circuit's approach to statistical evidence effectively requires. The court refused even to consider relevant statistical evidence because it supposedly pertained to discrimination that was "non-actionable" under Title VII. Moreover, according to the court, the statistics provided no evidence of intentional discrimination, apparently because the employer did not refute every conceivable non-discriminatory explanation for its statistics through record evidence. This clearly is not required by *Croson,* in which this Court reaffirmed that statistical evidence such as that proffered by the City is a powerful indication of discrimination.

A. No Employer Should Be Forced To Admit Liability To Engage In Affirmative Action, Particularly Where The Employer Is A Governmental Entity With A Demonstrated Record Of Prior Discrimination.

The Seventh Circuit's approach forces employers seeking to comply with constitutional mandates to face an untenable choice: admit prior intentional discrimination or forgo all forms of voluntary affirmative action. In so

doing, the court turns on its head the principle that the plaintiff continues to bear the ultimate burden of persuading the court that the defendant's evidence does not support an inference of prior discrimination, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.* at 292-93 (O'Connor, J., concurring in part and concurring in judgment); *see also St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), by effectively shifting the burden of proof to the employer to prove its own intentional discrimination as the only permissible means to support a remedial purpose.

Employers rarely will admit that they have engaged in intentional discrimination. This is the very reason that statistical evidence is so essential. It has been used for years, with this Court's approval, to evaluate employment practices in the absence of direct proof of intentional discrimination. *See Croson*, 488 U.S. at 500-01 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)); *id.* at 509.[1]

Moreover, no employer should have to prove a case against itself in order to engage in efforts to rectify prior discrimination. Indeed, this Court has disavowed such a requirement. *See Croson*, 488 U.S. at 500 (strong basis in evidence supporting remedial action may be shown by something "approaching a prima facie case of constitutional or statutory violation"); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment).[2] This Court has recognized that such a require-

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[1] Following *Croson*, numerous circuits likewise have reaffirmed the relevance of statistical evidence in determining the existence of a compelling purpose. *See, e.g., Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 725 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992).

[2] This Court has also expressly rejected such a requirement in the Title VII context. *See Johnson v. Transportation Agency,*

ment would have dangerous ramifications, particularly since a specific admission of past discrimination could expose governmental employers—and, as a result, taxpayers—to liability in damages. *See, e.g., Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 630 & n.8 (1987); *see also Local 93, Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. 501, 515 (1986).

The voluntary efforts undertaken by the government of a diverse city to incorporate residents who have long been victims of exclusionary policies and practices into its work force should not be stymied by unreasonable and unnecessary burdens.[3] *Croson* expressly contemplates affirmative action measures based on a factual predicate such as that established by the City in this case. *See* 488 U.S. at 509. The City of Chicago has an unfortunate history of employment discrimination against minorities. *See, e.g., United States v. City of Chicago,* 411 F. Supp. 218 (N.D. Ill. 1976) (Chicago Police Department guilty of race and sex discrimination in violation of Title VII), *aff'd in part and rev'd in part,* 549 F.2d 415 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977). This history, plus the City's statistical evidence, leaves no doubt that the City's remedial efforts were entirely appropriate. *Croson,* 488 U.S. at 509 ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.").

Santa Clara County, 480 U.S. 616, 630 & n.8 (1986); *see also United Steelworkers v. Weber,* 443 U.S. 193, 209 (1979); *id.* at 212 (to justify adoption of an affirmative action plan in that context, an employer need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part; rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories") (Blackmun, J., concurring).

[3] According to 1990 census figures, the City of Chicago's population is 37.9 percent white, 38.5 percent African-American, 19.6 percent Latino, and 3.8 percent other.

Although the en banc Seventh Circuit took "judicial notice" of cases involving allegations that the City engaged in reverse discrimination, *see* Pet. App. 10a (citing cases),[4] the court failed to acknowledge its own prior decisions in which the City was found to have discriminated against minorities, or studies of the City's hiring practices that establish a pattern of discrimination. A 1985 task force charged with analyzing prior discrimination by the City found "a history of exclusionary employment practices" against minorities and women, noting that hiring was "a closed system" and that promotions "were given on a preferential basis":

> The dominance of white males in higher paid job categories can be attributed to the closed personnel system utilized in the past. The application process was a closed system and in some cases, the Department of Personnel was bypassed completely. Recruitment of minorities and women was minimal at best. In addition, promotions were given on a preferential basis, and all employees were not given opportunities to apply and be considered for new positions. . . .
>
> The Task Force on Affirmative Action concludes that the personnel practices of the City of Chicago have had a negative effect on the opportunities of minorities and women for employment and advancement in the City's workforce. There is a history of exclusionary employment practices and underutilization of minorities and women in several of the occupational categories and departments within the City.

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[4] The majority suggests that the City of Chicago "under the Washington administration could hardly be thought insensitive to the interests of minority groups," but only one of the cases cited by the majority, *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989), contains any findings that the City engaged in discrimination against whites. In *Cygnar*, one official was found to have discriminated against whites in making certain personnel decisions in mid-1984. Surely that does not raise an issue of fact as to whether other officials—Commissioners Hoskins and Galante—discriminated against whites three years later.

> This indicates that minorities and women have been discriminated against and that equal employment opportunity has not been implemented and enforced.

Official Report of the Task Force on Affirmative Action —City of Chicago (Dec. 1985).

The CFD's failure to hire and promote minorities and women clearly calls into question its ability to effectively serve the community, particularly in a city as diverse as Chicago. Indeed, City Personnel Commissioner Hoskins acknowledged this as a relevant factor in the disputed promotions, noting that the CFD "is a community service organization which needs the trust and cooperation of the community it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels." Pet. App. 40a n.9. Unfortunately, the Seventh Circuit's opinion will dissuade public employers, such as the City of Chicago, from acting upon this recognized need to include all citizens in the work forces of entities charged with the public trust.

B. Evidence Of Statistically Significant Racial Disparities Should Not Be Disregarded Merely Because The Defendant Has Not Disproven All Possible Nondiscriminatory Explanations For Those Disparities.

The majority's willingness to cite cases alleging reverse discrimination while ignoring the backdrop of the City's prior discrimination is particularly troubling because the court engaged in speculation to refute the evidence proffered by the City to support its remedial efforts. When Commissioner Hoskins requested the affirmative action promotions at issue in June 1987, 11% of the engineers were minorities, compared to 29.2% of the firefighters, and 3.6% of the captains were minorities, compared to 13.6% of the lieutenants. *See* Pet. App. 96a-97a. The City's uncontradicted evidence established that the difference between the expected and actual percentage of minority engineers was 8.7 standard deviations, and that

the difference between the expected and actual percentage of minority captains was 3.96 standard deviations. *Id.* at 97a. These differences plainly were statistically significant. *See Hazelwood,* 433 U.S. at 309 n.14; *Castaneda v. Partida,* 430 U.S. 482, 496-97 n.17 (1976). The court dismissed this statistical evidence on the ground that the disparity could have been based on pre-1972 practices—which, since undertaken by a public employer, were not yet actionable under Title VII.[5]

The court's approach is perverse from a policy perspective and is contrary to the law. First, the mere fact that the perpetrator of discrimination happened to be a public, rather than private, employer whose actions prior to 1972 were not covered by Title VII should not affect its ability to remedy past discrimination. If prior discriminatory practices are the cause of an existing significant statistical disparity—regardless of whether those discriminatory practices had been within the compass of Title VII when they occurred—the employer should be permitted to remedy that disparity. Indeed, the Seventh Circuit has previously recognized that very principle. *See City of Chicago,* 549 F.2d at 436 ("[E]ven though Title VII did not become applicable to the City until 1972, the court had an obligation to correct the present consequences of discriminatory conduct that occurred before that date.").

Second, notwithstanding the Seventh Circuit's suggestions, *see* Pet. App. 13a, *Croson* does not indicate that

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[5] In wholly disregarding the City's statistical evidence, the Seventh Circuit also stated that there was "no evidence" that the City had engaged in intentional discrimination in violation of the Constitution prior to 1972. Pet. App. 13a. This reasoning is circular. As the City explains in its petition, this Court has held that statistical evidence is relevant to the determination of whether intentional discrimination has occurred. *See* Pet. 24-25. By rejecting the City's statistical evidence, the court precluded consideration of the very evidence that could help establish that the City's prior discriminatory actions were indeed intentional.

only discrimination that has been proven unlawful may be remedied. *See* 488 U.S. at 500; *see also Wygant*, 476 U.S. at 289-93 (O'Connor, J., concurring in part and concurring in judgment).[6] Statistics such as those proffered by the City, clearly reflecting unjustified exclusionary practices, may appropriately be used in establishing a strong basis for remedial action.

Given the court's avowed emphasis on so-called "actionable" discrimination, it is particularly troubling that the court gave short shrift to evidence pertaining to the 1985 engineer test that revealed a Title VII violation. The uncontroverted evidence established that the 1985 engineer test had an adverse impact on African-Americans and Latinos, and that the City was aware of this fact. *See* Pet. App. 46a. Moreover, the record contained expert evidence supporting the City's contention that the examination could not have been validated for use in strict rank order, thereby establishing that the City would not be able to prove a legitimate job-related justification for this adverse impact. *See* Pet. App. 99a; *id.* at 50a (citing Barrett Aff. ¶¶ 16, 17). Strict rank order use of this test with an adverse impact that could not be validated as job-related would certainly have constituted a violation of Title VII. In light of this, the City departed from strict rank order in making promotions.

In disregarding this evidence, the majority speculated—with no record support—that "an alternative possibility . . . is that the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order," Pet. App. 13a-14a, and that "[t]he city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to

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[6] Indeed, state and local governments have a compelling interest in ameliorating the effects of even entirely lawful, private discrimination that prevents disadvantaged groups from obtaining equal opportunities for economic and social advancements. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984).

practice reverse discrimination by departing from rank order fixed by nonbiased tests." *Id.* at 11a. The record is clear, however, that strict rank order use of the promotion list was no more valid than the mechanism selected by the City—and that the latter had less adverse impact. According to the *EEOC Uniform Guidelines on Employee Selection Procedures,* when there are two equally valid selection mechanisms, an employer is obligated to select the one with the less adverse impact on minorities. *See* 29 C.F.R. § 1607.3(B) (1991).[7] This requirement has been vital in increasing employment opportunities to members of traditionally disadvantaged groups, and its survival is of critical importance to the effective enforcement of the civil rights laws.

Blind to both the law and the facts by an unabashed hostility to the concept of affirmative action, *see, e.g.,* Pet. App. 2a-3a (cases "involve challenges to racial favoritism in promotions . . . ."); *id.* at 14a ("[t]here is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination . . . ."), the en banc Seventh Circuit adopted a dismissive approach to the evidence that impaired the City's ability to demonstrate the factual basis for its remedial efforts. Moreover, the court engaged in pure speculation that required the City to refute every conceivable nondiscriminatory rationale for its remedial actions. As an en banc opinion, *Billish* will be the law in the Seventh Circuit and will be persuasive authority in all circuits, despite its interlocutory nature. It establishes an unsettling precedent that places an unreasonable burden upon local governments and other employers seeking to implement legitimate remedial measures to rectify prior discrimination. Further review of the court's treatment of statistical evidence is therefore warranted.

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[7] Indeed, failure to use selection criteria with the least discriminatory impact may be evidence of pretext. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 436 (1975).

II. GOVERNMENTAL EMPLOYERS WILL BE DETERRED FROM SETTLING CIVIL RIGHTS CASES IF CONSENT DECREES ARE IRRELEVANT IN ASSESSING WHETHER AN EMPLOYER HAS A STRONG BASIS IN EVIDENCE FOR ENGAGING IN REMEDIAL EFFORTS TO RECTIFY PRIOR DISCRIMINATION.

Consent decrees have long played a vital role in the resolution of employment discrimination disputes. Consent decrees allow parties to fashion solutions that are most appropriate and tailored to their specific needs, while freeing judicial resources by removing complex cases from the trial dockets—thereby benefiting litigants, the public, and the federal courts. By pronouncing that consent decrees are irrelevant in determining the constitutionality of affirmative action measures, the decision below threatens to severly undermine their utility as a remedial tool. If employers cannot rely in later litigation on previously entered consent decrees and their litigation history as factors in establishing a "strong basis in evidence" for remedial action, there will be very little reason to enter those decrees at all.

The consent decree in this case, obtained by the DOJ, contained legal and factual underpinnings that strengthened the foundation of the City's remedial efforts. The Seventh Circuit majority, however, found the City's consent decree irrelevant both because the plaintiffs were not parties to it, *see Martin v. Wilks,* 490 U.S. 755 (1989), and because it contained no specific judicial findings that the particular remedies set forth in the decree were necessary to remedy prior discrimination and because it had not been subject to strict scrutiny when approved. *See* Pet. App. 6a-7a.

In disregarding the consent decree because of a lack of judicial findings, the Seventh Circuit has implicitly required that a decree must contain such findings before it may be considered in assessing an employer's basis for

engaging in affirmative action. This Court, however, has declined to require such a judicial determination, *see Wygant,* 476 U.S. at 289 (O'Connor, J., concurring in part and concurring in judgment);[8] *United Steelworkers v. Weber,* 443 U.S. 193 (1979), for good reason: such a requirement "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant,* 477 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment). Many local governments enter into consent decrees in large part to avoid judicial findings pertaining to liability. One important purpose of settlements, including consent decrees, is to avoid even the trial itself. "The parties would see little advantage in compromise if they were required to undergo a trial on the merits to obtain approval of the settlement . . . ." Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation,* 1983 U. Ill. L. Rev. 579, 586 (1983).

This Court has consistently emphasized that cooperative settlement is a valuable tool in civil rights litigation. *See, e.g., Johnson,* 480 U.S. at 630 & n.8; *Local 93,* 478 U.S. at 515 (citing cases). Settlement "acts as a lubricant for change. Structural reform can begin immediately and the likelihood of compliance is greater than if a coercive judicial decree is entered." Anderson, *supra,* at 580. Consent decrees provide a vital means for such reform particularly where, as here, a governmental bureaucracy is involved and resistance to judicially mandated efforts could impede progress. *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L.J. 897, 899.

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[8] As Justice O'Connor recognized in *Wygant,* "[a] violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed." *Wygant,* 476 U.S. at 289-90 (O'Connor, J., concurring in part and concurring in judgment).

As *amici* note above, the present case is particularly troubling because the defendant is a public employer whose actions serve as an example to the community at large and to private employers. "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 at 290 (O'Connor, J., concurring in part and concurring in judgment) (citations omitted) (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 364 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

In finding the City's consent decree wholly irrelevant to the strong basis in evidence determination, the Seventh Circuit also emphasized that the decree was entered into prior to *Croson*. Such a criticism effectively precludes any reliance on pre-*Croson* decrees. Yet the decree here remained in effect after *Croson*. *See* Pet. App. 38a. n.8. The City was therefore subject to a finding of contempt for violation of it. *See* 18 U.S.C. § 401; *Walker v. City of Birmingham*, 388 U.S. 307, 315-17 (1967). Moreover, as the Seventh Circuit panel opinion recognized, the decree was entered into "only after extensive litigation with the DOJ" and a "realistic" assessment by the City "that its policies violated the Constitution." Pet. App. 36a. The consent decree and its litigation history clearly are relevant factors in evaluating whether the City has established a strong basis for its remedial efforts, regardless of whether the decree was entered prior to *Croson*'s enunciation of the strict scrutiny standard.

In rejecting the consent decree, the Seventh Circuit has failed to recognize that both the United States and civil rights plaintiffs have traditionally sought decrees that go beyond merely requiring the defendant to cease its prior discriminatory practices, and instead require race- and gender-conscious affirmative action to redress prior discrimination. *See, e.g., Local 93*, 478 U.S. at 516-17.

Amici and other plaintiffs negotiate specifically to obtain such critical provisions, which are essential if an employer's work force is to begin to reflect the qualified work force in the population rather than the prior discriminatory practices. The Seventh Circuit has determined that such hard-fought bargains are meaningless.

Given that all decrees entered by district courts are subject to equal protection principles, *see, e.g., United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion), all employers, public and private, must worry about the implications of this decision. Employers attempting to satisfy consent decrees face severe consequences either way under the Seventh Circuit's approach—a finding of contempt if they violate the decree, or protracted litigation in which they cannot rely on that decree if they implement affirmative action pursuant to it that is later challenged. The cumulative effect of the Seventh Circuit's treatment of consent decrees may well be to eliminate employers' incentives to enter into consent decrees, even in the most egregious cases of discrimination, and to undermine significantly the utility of those decrees already in existence. This Court's review of such a radical rejection of the most common device used to settle discrimination cases is amply warranted.

CONCLUSION

For the reasons set forth above, *amici* request this Court to grant the petition for the writ of certiorari.

Respectfully submitted,

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August 18, 1993

No. 93-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is neces-

sary because counsel for respondents Chicago Fire Fighters Union Local No. 2, *et al.*, and counsel for respondents Billish, *et al.*, have refused consent.

The *amici* are organizations whose members include state, county, and municipal governments and their officials. This case concerns one of the most pressing and recurring legal issues affecting state and local governments—the need to use race-conscious measures to remedy past racial discrimination in public employment. The *amici* participated on the merits in both *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), two of the Court's most recent cases involving the constitutionality of affirmative action measures taken by local governments. In addition, the Court granted our motion to participate at the probable jurisdiction stage in *City of Richmond v. J.A. Croson Co. See* 484 U.S. 1058 (1988).

In this case, the City of Chicago sought to remedy the effects of a long history of alleged discrimination in its Fire Department. Chicago was subject to a consent decree, obtained by the United States Department of Justice, that required the City to engage in race-conscious promotion practices. In addition, Chicago was faced with extreme statistical disparities between the entry-level and upper ranks of its Fire Department, the likely product of the decades of discrimination in hiring and promotions that led to the consent decree. In these circumstances, Chicago adopted an affirmative action plan, based on written findings, that called for the Fire Department to remedy the past discrimination by appointing a few well-qualified minority firefighters out of the rank order set by an examination.

Many state and local governments have been faced with similar circumstances and have taken action similar to—in some instances, indistinguishable from—those taken by Chicago. Such actions have, as we explain below, been

upheld repeatedly by other courts of appeals. But the court below declared the consent decree irrelevant and minimized the significance of stark statistical disparities that strongly evidenced past discrimination. Instead, the court of appeals based its decision on after-the-fact speculation about the motives of particular local decisionmakers. By doing so, the court of appeals has created a climate of uncertainty in which state and local governments will find it increasingly difficult to function.

The kinds of evidence of past discrimination that were available to Chicago—the consent decree and the statistical disparities that had no other reasonable explanation—are precisely the kinds of evidence of past discrimination that are typically available to state and local governments. It is unusual for more evidence to be available. Indeed, the only alternative to such sources of evidence is a highly divisive inquiry into the decisions of particular officials and employees—something that no community should be forced to undergo as the price of trying to remedy past discrimination.

The limited race-conscious action Chicago took—a relatively few minority promotions out of rank order, as determined by an examination on which strict rank-order distinctions were not material—is close to the minimum needed to deal with the effects of prior discrimination. Moreover, Chicago was obligated to engage in race-conscious promotions by the terms of its consent decree. The failure to engage in some measure of affirmative action would potentially have subjected it to contempt proceedings. The court of appeals nonetheless rejected Chicago's reasonable affirmative action measures, which would have passed muster in several other circuits.

In attempting to deal with the sensitive issues presented by these cases, state and local governments find themselves faced with the threat of litigation from both minority and non-minority employees. This litigation can expose state and local treasuries to substantial compensatory damages

(which can, of course, be awarded whenever a court decides a constitutional issue against a unit of government, even if the constitutional principle was not clearly established when the government acted). Individual officials will be asked to act under the shadow of personally ruinous punitive damages. When, as is often true, the state or local government is also subject to a consent decree, it must make an assessment of its obligations under that decree as well.

In these circumstances, it is especially important to state and local governments that there be clear guidelines that permit them the flexibility they need to address these difficult problems at the level where they are best addressed—by elected governments across the nation. Because of the distinct perspective that state and local governments bring to this issue, and because of our strong interest in it, we respectfully move for leave to submit the attached brief to assist the Court in its determination whether to grant further review.

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August 18, 1993

QUESTIONS PRESENTED

1. Whether a state or local government may rely on a consent decree that requires race-conscious action as part of the justification for an affirmative action plan.

2. Whether a state or local government may consider statistical evidence of a manifest underrepresentation of minorities in its workforce in determining whether it has engaged in unconstitutional discrimination that may be remedied by race-conscious affirmative action.

3. Whether a state or local government may depart from strict rank-order use of promotional lists, and make a limited number of race-conscious promotions, when such action is necessary to remedy the effects of prior discrimination and strict rank order does not predict ability to perform the job in question.

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STATUTES

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. *Background.* This litigation concerns three affirmative action measures taken by the City of Chicago in 1987, but the City initially adopted the affirmative action plan that led to this litigation as a result of lawsuits filed by the United States Department of Justice in 1973 and 1980. Those suits challenged the hiring and promotion practices of the Chicago Fire Department. The promotion aspects of the federal government's suits concerned promotions to the position of engineer, lieutenant, and captain. Pet. App. 19a, 91a. Those are, in ascending order, three of the four non-entry level positions in the Chicago Fire Department. (The position above captain is Battalion Chief. The entry-level position is "firefighter." *Id.* at 18a.) All promotions in the Fire Department are from within the ranks, and all are done on the basis of examinations. *Ibid.*

The 1973 lawsuit culminated in a consent decree settling the hiring aspects of the federal government's suit. Pet. App. 18a-19a, 91a.[1] The 1980 lawsuit was a response to a set of promotional examinations administered by the City in 1979; the federal government alleged that these examinations had a severe adverse impact on minorities and were not adequately validated, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Pet. App. 20a, 91a-92a. The 1980 lawsuit was resolved by a consent decree that specified, among other things, that the City (*id.* at 92a):

> as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks [of the Fire Depart-

[1] This litigation also led to an injunction, entered by the court of appeals, that forbade the City from making any promotions based on the examinations the City had administered "unless the promotions were 'first offered to minority candidates on the respective lists in the order of their rank thereon.'" Pet. App. 20a (citation omitted).

> ment] with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

2. *The Chicago Fire Fighters case.* In 1983, when Fire Commissioner Louis Galante took office, he determined that the 1979 promotional lists were stale and ordered that new examinations be prepared and administered and new lists be compiled. Pet. App. 23a. Respondents in the *Chicago Fire Fighters* case challenge promotions that were made to engineer and captain from these new lists, but not in strict rank order.

The engineers' examination was administered in 1985, and a promotional list, based on the examination, was prepared in 1986. The captains' examination was administered in 1986 and 1987. The City then addressed the question whether the list was to be used in strict rank order. Pet. App. 23a-24a. In 1987, the City's Commissioner of Personnel determined that the lists should not be used in strict rank order. *Id.* at 24a. In written findings, Commissioner Hoskins identified the following bases for his decision:

> (i) The 1980 consent decree required the Department to take steps to increase the minority composition of the upper ranks of the Department so that they would more closely reflect the ranks from which promotions were made. The City's Corporation Counsel was of the view that the use of strict rank order would violate the decree. 6/16 letter at 1; 7/9 letter at 1.[2]
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> (ii) The engineers' list could not be validated for use in strict rank order. That is, while a substantial difference in scores likely reflected genuine differ-

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[2] The citations refer to pages in Commissioner Hoskins's letters, which were dated respectively June 16, 1987, and July 9, 1987. The letters are found at Chicago Fire Fighters R. 71, Exhibits E and F.

ences in ability to do the job, small differences in scores did not reflect such genuine differences in ability. Rank-order promotions would therefore violate Title VII. 6/16 letter at 2-3.

(iii) Statistical evidence demonstrated that the effects of prior discrimination persisted in the upper ranks of the Fire Department. These effects would not be remedied by rank-order use of the list. 6/16 letter at 2; 7/9 letter at 2.

(iv) The City's collective bargaining agreement required it to take steps to promote minorities so as to remedy prior discrimination. 6/16 letter at 1; 7/9 letter at 1-2.

Commissioner Hoskins concluded that the lists should be used with promotional goals of 20% black candidates and 5% Hispanic candidates. Fire Commissioner Galante accordingly issued promotional orders in 1987 in which he departed from strict rank order and sought to achieve the affirmative action goals specified by Commissioner Hoskins. Pet. App. 24a.[3]

3. *The Billish case.* The *Billish* litigation involves promotions to captain made by Commissioner Galante in the interval after he had ordered a new captains' examination, but before the Department had completed administering the examination. In December 1986, the Fire Department needed additional captains, and because the captains' examination was not complete, the only available list was the 1979 list. Commissioner Galante promoted 18 white lieutenants and 2 black lieutenants from that list. The minority lieutenants were promoted out of rank order, but only after the Personnel Depart-

[3] Specifically, of the 56 firefighters whom Commissioner Galante promoted to engineer, 8 were black firefighters promoted out of rank order. (The 48 rank-order promotions included 7 black firefighters and 2 Hispanic firefighters.) Commissioner Galante promoted 24 lieutenants to captain, one of whom was a Hispanic lieutenant promoted out of rank order. (The rank order promotions included five black lieutenants.) Pet. App. 24a.

ment had determined that their scores and experience qualified them for the position. Pet. App. 23a-24a.[4]

4. *The decisions below.* Judges Holderman and Zagel of the Northern District of Illinois granted summary judgment in favor of the City and its officials in *Chicago Fire Fighters* and *Billish* respectively. Pet. App. 84a-106a; 107a-127a. A panel of the Seventh Circuit, over a dissent, affirmed in *Chicago Fire Fighters* and affirmed in part and reversed in part in *Billish*. *Id.* at 16a-83a.

The court of appeals then granted rehearing en banc and, by a vote of 5-4 (with Judges Flaum and Rovner not participating), overturned the panel's ruling and reversed the district courts in both cases. The en banc majority concluded that the City had only a limited basis for believing that it had engaged in past discrimination. The majority also suggested that the City's affirmative action measures were not narrowly tailored to remedy that discrimination.

a. *Past discrimination.* In assessing the evidence that the City had discriminated in the past, the en banc majority put the consent decree wholly aside. It asserted that the City's actions were not "required by the consent decree," and that even if they were, "this would not be a defense [because t]he plaintiffs were not parties to the decree." Pet. App. 6a.

The majority then concluded that there was sufficient evidence of past discrimination in hiring only for "a brief period of time after the date in 1972 on which Title VII . . . first became applicable to states and municipalities" and before the 1974 consent decree. Pet. App. 5a-6a. The majority asserted that there was "no evidence" that the City had engaged in unlawful discrimination

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[4] The minority lieutenants' scores in fact fell below the nominal "cut off point" on the (then eight-year old) 1979 list, but the Personnel Department determined that this did not reflect on their qualifications for promotion. Pet. App. 23a-24a.

before 1972. *Id.* at 13a. With this conclusion as a predicate—that the only unlawful hiring discrimination occurred in a period of less than two years—the en banc majority rejected the City's justifications for affirmative action promotions to both captain and engineer.

In connection with the promotions to captain, the majority ruled that the City was not justified in concluding that the extremely small number of minority captains in the mid-1980s—7 minority captains out of 194 in 1987 [5]—was the result of discrimination. Pet. App. 13a. The majority reached this conclusion despite recognizing "that there was actionable discrimination in favor of whites . . . in promotions from 1972 to [the consent decree in] 1980" (*id.* at 6a); that even after the 1980 consent decree, the City did not make promotions from a new list for seven years (*id.* at 13a); and that the earlier hiring discrimination could cause a lack of minorities in the upper ranks. *Id.* at 12a. The majority explained that "the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that . . . discrimination was rectified in 1974." *Ibid.*

In connection with the promotions to engineer, the majority again rejected the statistical disparity between the firefighter and engineer ranks on the ground that this disparity might reflect "*nonactionable* discrimination in years past" (Pet. App. 11a; emphasis in original)—that is, discrimination that occurred before Title VII became applicable to state and local governments in 1972. *Id.* at 12a-13a. The majority again relied in this connection on its conclusion that "there is no evidence" of pre-1972 intentional discrimination. *Id.* at 13a. In addition, the majority conjectured that the disparity between the engineer and firefighter ranks was the result of affirmative action in hiring firefighters that the City undertook pursuant to the consent decree that governed hiring. *Id.* at 11a-12a.

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[5] Chicago Fire Fighters R. 71 at Stensland Aff. para. 19.

Finally, the en banc majority rejected the other basis for affirmative action identified in Commissioner Hoskins's findings—the City's determination that the engineers' examination, although generally valid, was not valid for rank order use. The majority asserted that "[t]he city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination" (Pet. App. 11a). The en banc majority cited no expert evidence in the record (and, so far as we are aware, there is none) suggesting that the test might have been valid for use in rank order.

b. *Narrow tailoring.* The en banc majority also commented on whether some of the affirmative action measures were narrowly tailored. As for the two promotions at issue in the *Billish* case—promotions that Commissioner Galante made in January 1987 out of the rank order set by the discriminatory 1979 test, while he awaited a new list—the majority suggested that Commissioner Galante should have waited until the new list became available. (It ultimately became available in October 1987.) The majority explained (Pet. App. 8a):

> It seems that, distressed by the all-white composition of the group of captains appointed in the latest round of promotions, Commissioner Galante decided to appoint possibly unqualified blacks without waiting to see how blacks would perform on a race-neutral examination. If that is what happened—a question for trial—it would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that [this Court's decisions] require[].

Finally, the en banc majority stated that in promoting one Hispanic lieutenant to captain out of rank order, a promotion at issue in the *Chicago Fire Fighters* case, the Department might have been "trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order." Pet. App. 14a.

Four judges dissented for the reasons stated in the panel opinion. Pet. App. 15a.

ARGUMENT

The en banc court of appeals, by the narrowest of margins, has decided an issue of exceptional importance in a way that is inconsistent with the decisions of several other courts of appeals and contrary to the rulings of this Court. This decision creates a climate of debilitating uncertainty for state and local governments that seek to remedy past discrimination without exposing themselves and their officials to liability. The fact that the decision is technically interlocutory in no way mitigates the harmful effects it will have on state and local governments throughout the nation. Further review is therefore warranted.

1. The issues presented by this case are common among state and local governments. They arise whenever state and local governments are confronted with powerful evidence of extensive past discrimination in hiring and promotions within a government department and seek to remedy the effects of that discrimination.

Especially in police and fire departments, the effects of discrimination can persist in the upper ranks long after the government stops actively discriminating. That is because careers in police and fire departments can span two or three decades, and operational needs often require—as in the Chicago Fire Department—that promotions be made exclusively from within the department. In these circumstances, unless the state or local government takes some form of remedial affirmative action in promotions, it will be at least a generation before the effects of hiring discrimination on the upper ranks are undone.

It is well established that a state or local government has a compelling interest in not perpetuating the effects of past discrimination. *See, e.g., Shaw v. Reno,* 113 S. Ct. 2816, 2831-32 (1993); *City of Richmond v. J.A. Croson*

Co., 488 U.S. 469, 493 (1989) (plurality opinion); *id.* at 518 (Kennedy, J., concurring). This is true even when the past discrimination is by entities other than the government. *See id.* at 491-93 (plurality opinion). When, as here, the government is at risk of perpetuating the effects of its own unlawful discrimination, its interest in taking remedial action is even stronger. *See id.* at 518 (Kennedy, J., concurring): "[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself."

In these circumstances, it is sensible for state and local governments to do what Chicago did here: to adopt, as a flexible benchmark for promotions, the composition of the ranks from which promotions are made, and to seek gradually to achieve that goal—not by the wholesale use of quotas, but by occasionally promoting a few well-qualified minority employees out of strict examination rank order, together with large numbers of minority and nonminority employees promoted according to traditional criteria. There is simply no more limited way to remedy within a reasonable time the effects of discrimination on the upper ranks.

The decision of the court of appeals in this case seriously threatens this reasonable and practical approach to an extremely difficult problem. First, the court of appeals trivialized the significance of the statistical disparity between upper and lower ranks by insisting that there was "actionable" hiring discrimination only in a period of less than two years, between 1972 and 1974. This is an unrealistic and legally unwarranted conclusion, inconsistent with the decision of every other court of appeals that has addressed the issue.

Second, the court of appeals simply refused to consider a powerful piece of evidence that validates the appropriateness of the City's actions: the consent decree, en-

tered into after extensive litigation, that demonstrates both the strong basis for the City's actions and the appropriateness of the specific measures it chose.

Third, the court of appeals subjected the City's decisions to a form of highly intrusive, after-the-fact micromanagement. After breezily and erroneously discarding the consent decree and the statistical disparities as justifications for the affirmative action plan, the court of appeals speculated—and invited a jury to speculate—that specific decisions by City officials were not efforts to implement the plan but instead reflected only that the officials were "distressed by" the lack of minorities in a recently promoted group, that the City was seeking to "curry favor" with minorities, or that the City's findings about the validity of tests—findings uncontradicted by any expert evidence in the record—"sound like pretexts" (Pet. App. 8a, 14a, 11a). State and local governments and their officials should not be asked to make decisions in a climate of the kind that will be created if the court of appeals' approach prevails.

2. The court of appeals' decision cannot be reconciled with the First Circuit's decision in *Stuart v. Roache,* 951 F. 2d 446 (1st Cir. 1991) (Breyer, J.), *cert. denied,* 112 S. Ct. 1948 (1992), which upheld race-conscious promotions on facts strikingly similar to those present here. *Stuart,* like this case, was a challenge to promotions (in the Boston Police Department) made pursuant to a consent decree. 951 F. 2d at 448-49. Judge Breyer identified three factors that established a sufficient basis for Boston to engage in affirmative action in promotions, each of which is present in this case as well.

First, only 0.45 percent of the sergeants in the Boston police department were black, but 4.5 percent of the officers eligible for promotion were black (951 F. 2d at 450)—just as, in Chicago, there was a severe disparity between the upper ranks and the ranks from which promotions were made. (In Chicago in 1987, the percentage

of minority lieutenants was almost four times the percentage of minority captains; the percentage of minority firefighters was almost two and one-half times the percentage of minority engineers. Chicago Fire Fighters R. 71 at Stensland Aff. para. 19.)

Second, earlier litigation had established that Boston discriminated in hiring before 1970.[6] Judge Breyer explained why this was significant in language that echoed Commissioner Hoskins's rationale for Chicago's affirmative action plan and that directly contradicts the Seventh Circuit's refusal to recognize that Chicago had a basis for believing that the underrepresentation of minorities in the upper ranks was the result of discrimination (951 F. 2d at 452):

> The result, as of 1970, was a Police Department with just over 2 percent of its officers black or hispanic, in a city where these minority groups comprised 16 percent of the total population. Obviously, if few blacks become police officers, few blacks will become sergeants. . . .
>
> One obvious reason, then, why there may have been few black sergeants in the Boston Police Force in 1978 is that the Department had not hired many black police officers before 1970. Since unjustified discrimination accounted for the latter fact, the latter fact cannot excuse the former.

The First Circuit went on to state expressly that "findings of recent entry-level discrimination would seem sufficient to justify race-conscious remedies at both entry and pro-

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[6] The earlier litigation in Boston was a litigated case (*Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972)), leading to a judicial finding of discrimination in hiring, whereas in Chicago the finding of hiring discrimination was the product of a consent decree. But the Seventh Circuit did not question that the consent decree gave Chicago an adequate basis for concluding that there had been discrimination in hiring. *See* Pet. App. 5a-6a.

motional levels." *Ibid.* This proposition is irreconcilable with what the en banc court of appeals did in this case.[7]

The third factor that, the First Circuit ruled, established a basis for affirmative action in promotions was that there were "allegations of unfair, discriminatory promotional examinations." 951 F. 2d at 452. As in this case, the examinations were discriminatory in the sense that they had a disparate impact and were not validated. *See id.* at 451. Here, of course, there are not just allegations of discriminatory promotional exams but a court

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[7] Although the en banc Seventh Circuit did not address the reasoning of *Stuart*, it did offer this argument to support its decision to disregard the underrepresentation of minorities in the upper ranks (Pet. App. 11a-12a):

> If, to take an example closer to home, law schools through their affirmative-action programs increased the percentage of minority law students to 10 percent, the fact that law school faculties were on average only 2 percent black would not be evidence of discrimination in appointments to faculty positions. The larger fraction of minority students would be an artifact of the law schools' having lowered their admission standards and not a true measure of the pool from which faculty would be recruited.

The City's affirmative action hiring program was not a matter of "lowering admissions standards." It was a matter of remedying extensive past discrimination (not denied even by the en banc court of appeals) by hiring qualified minorities previously excluded by the City's discriminatory practices. The result was not, as the en banc majority suggests, to bring less qualified firefighters into the workforce. On the contrary: the result was to bring about an entry-level cohort that more closely approximated the workforce that the City would have had in the absence of discrimination.

To make the analogy accurate one would have to hypothesize a law school that had both engaged in extensive discrimination in admissions for a number of years and hired its faculty exclusively from its own graduates. If such a school embarked on a program of affirmative action in admissions designed to produce a student body that reflected the enrollment it would have had in the absence of discrimination, any subsequent sharp disparity between faculty and student body would of course provide a basis for believing that the faculty reflected the effects of past discrimination.

order, and later a consent decree, that forbade the City from using them.

Judge Breyer's opinion in *Stuart v. Roache* also gave five reasons why Boston's affirmative action plan was narrowly tailored; all five apply at least as strongly to Chicago's plan. First, the Boston promotional goals were "linked to the size of the relevant qualified labor pool" (951 F. 2d at 454). As the panel below explained, the Chicago affirmative action goals were similarly related to the qualified pool of employees available for promotions, even if an especially "demanding methodology" was used to make the comparison. Pet. App. 53a-54a. Second, in Boston the minority officers who benefited from the plan were "qualified" officers who "have passed civil service examinations validated as fair and non-discriminatory" (951 F. 2d at 454) even though they were taken out of rank order. The same was true in Chicago; as the panel below noted, "[t]he plaintiffs do not challenge the qualifications of those minority candidates promoted out of rank order" (Pet. App. 53a).[8]

Third, the Boston affirmative action plan "g[a]ve[] only limited advantage to minority officers, increasing the number of black sergeants gradually over time" (951

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[8] The promotions at issue in the *Billish* case were awarded to minority lieutenants whose scores on the 1979 exam were below the "cut off point." This was apparently the basis for the en banc majority's reference to "possibly unqualified blacks" (Pet. App. 8a).

The record, however, contains an explanation that the cut off score is not to be equated with a passing score for purposes of assessing qualifications, since it considers such factors as expected personnel needs. Billish R. 44 at Exh. A paras. 3, 4. Moreover, at the time the promotions were made in 1987, the 1979 examination would have been an unreliable basis for assessing the qualifications of lieutenants who by then had eight more years' experience—even if the examination had not been successfully challenged by the Department of Justice as discriminatory.

The minority lieutenants who were promoted were found by the Personnel Department to be qualified, and the en banc majority cited nothing in the record that impugns that finding.

F. 2d at 454)—just as Chicago appointed only a few employees out of rank order, together with a much larger number of rank-order promotions. Fourth, the Boston affirmative action plan, although it had "been extended twice since its original expiration date . . . and could be extended further," was "limited in time" (*id.* at 454). The Chicago plan was also "limited in duration" (Pet. App. 53a); it was to last "three years or until 350 promotions were made to engineer or 150 promotions to captain." *Ibid.*

Fifth, the Boston affirmative action plan, embodied in a consent decree, "explain[ed] why alternative, racially-neutral relief alone would likely prove inadequate." 951 F. 2d at 455. Commissioner Hoskins's findings also explained why the City was forced to reject race-neutral remedies: Operational needs required that promotions be made from within the Department, thus precluding such alternatives as more aggressive recruiting, but strict rank order use of the list would not remedy the past discrimination. 6/16/87 letter at 3; 7/9/87 letter at 3.

3. The facts of this case are, as we have noted, typical of many affirmative action cases, and—even apart from the outright inconsistency with *Stuart v. Roache*—the crucial steps in the reasoning of the court of appeals are not only incorrect but at odds with the rulings of every other court of appeals that has decided a similar issue. The en banc court of appeals' holding rests on two premises: that despite severe statistical disparities, there was "no evidence" of unlawful pre-1972 discrimination by Chicago in hiring or promotions; and that the consent decree provides no support for Chicago's affirmative action measures.

a. *The statistical disparities.* The en banc court of appeals concluded that because the Justice Department's suits against the City alleged statistical disparities without adequate validation, those suits, and the consent decrees, were evidence only that the City had violated the

"disparate impact" standard of Title VII. Since the Constitution requires a showing of intentional discrimination, not just disparate impact, and since Title VII did not become applicable to state and local governments until 1972, the en banc majority concluded that the only unlawful discrimination in hiring occurred between 1972 and the 1974 consent decree. Pet. App. 11a, 12a-13a. The court of appeals deprecated the suggestion that hiring discrimination in such a brief period could be responsible for the disproportionately small number of minorities in the upper ranks. *Id.* at 12a-13a.

But the en banc court of appeals' flat statement about pre-1972 intentional discrimination—"of this there is no evidence" (Pet. App. 13a)—is inconsistent with common sense, with the decisions of this Court, and with the rulings of at least three other courts of appeals. Statistical disparities, while of course not always conclusive proof of intentional discrimination, are without question *evidence* of intentional discrimination. Therefore they can help establish the "strong basis in evidence for [a] conclusion that remedial action [is] necessary." *Croson,* 488 U.S. at 500, quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277 (1986) (plurality opinion). Indeed, if the statistical disparities are large, " 'they alone' " may justify race-conscious affirmative action. *Croson,* 488 U.S. at 501, quoting *Hazelwood School District v. United States,* 433 U.S. 299, 307-08 (1977).

Of course the City cannot be held liable for violating Title VII in the years before 1972. But it is obviously wrong to say that statistics showing a massive exclusion of minorities from the Fire Department—in 1973, less than 5% of the uniformed personnel in the Chicago Fire Department were black or Hispanic (Pet. App. 18a)—are "no evidence" of unlawful discrimination. This plainly erroneous proposition was a linchpin of the en banc court of appeals' decision. Whether or not those statistics would, without more, have convinced a finder of fact that

the City had violated the Constitution, they are clearly enough to establish that the City had a "strong basis in evidence" to believe that it had intentionally discriminated.

As the Sixth Circuit explicitly ruled: "Evidence of wide statistical disparities . . . may justify an affirmative action policy adopted by a public employer." *Vogel v. City of Cincinnati,* 959 F. 2d 594, 599 (6th Cir.), *cert. denied,* 113 S. Ct. 86 (1992). *See also Jansen v. City of Cincinnati,* 977 F. 2d 238, 242 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 2344 (1993). The Ninth Circuit's position is equally clear: "[W]e emphasize[] that such statistical disparities are 'an invaluable tool' in demonstrating the discrimination necessary to establish a compelling interest." *Associated General Contractors, Inc. v. Coalition for Economic Equity,* 950 F. 2d 1401, 1414 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 1670 (1992), quoting *Coral Constr. Co. v. King County,* 941 F. 2d 910, 918 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 875 (1992). And the First Circuit, in *Stuart v. Roache,* took the same position. 951 F. 2d at 450-52.

In litigation, of course, the parties need not stop with statistics. They can examine the qualifications of particular employees and the actions and dispositions of particular decisionmakers. But state and local governments should not be required to engage in such adversarial, finger-pointing exercises as the price for seeking to remedy discrimination. That is why this Court has repeatedly ruled that a state or local government may engage in affirmative action without a judicial finding of discrimination, so long as it has a "strong basis in evidence" (*Croson,* 488 U.S. at 500) to believe there was discrimination, and that statistical disparities of the kind present here—between the promotional ranks and the specific groups from which all those promoted will be selected—are enough to establish such a strong basis. *See id.* at 501, quoting *Hazelwood,* 433 U.S. at 307-08: "There is no

doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.'" *See also Johnson v. Transportation Agency*, 480 U.S. 616, 651-52 (1987) (O'Connor, J., concurring in the judgment).

b. *The consent decree.* The en banc court of appeals simply put the consent decree aside as a factor in the litigation, reasoning as follows (Pet. App. 6a):

> Even if the [affirmative action] measures had been required by the consent decree, which they were not . . . this would not be a defense. The plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989).

Apart from this passage, the consent decree simply did not play a role in the en banc majority's assessment of whether the City had a substantial basis to engage in affirmative action. It appears that, so far as the en banc majority was concerned, this reasoning exhausted the significance of the consent decree to this litigation.

The en banc majority's approach rests on two misunderstandings. The first is that unless the consent decree "required" the precise actions that the City took, the decree is irrelevant to the constitutionality of the City's actions. But the fact that a consent decree requires race-conscious action is plainly some evidence that the City has a sufficient basis for believing that such action is needed. The consent decree does not become irrelevant just because it contains a long-range goal, instead of specifying each step that must be taken to achieve that goal.

More important, the court of appeals' approach ignores the practicalities faced by state and local governments functioning under consent decrees. Consent decrees are meant to be administered by the parties with a maximum of voluntary compliance and a minimum of litigation.

The City determined that its actions were required by the decree. *See* page 3, *supra*. As long as that determination was reasonable, the City should not be second-guessed on the ground that it should have come closer to the line in assessing its obligations under the decree. Otherwise, the City would be forced to walk a tightrope between violating the consent decree and exposing itself to liability to nonminority plaintiffs.

The en banc majority's second misunderstanding was laid bare by the Eighth Circuit in *Donaghy v. City of Omaha*, 933 F. 2d 1448, 1457-58 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992), another case very similar to this one, in which the Eighth Circuit rejected the very argument that the en banc court of appeals accepted here. The fact that respondents were not parties to the consent decree—and therefore, under *Martin v. Wilks*, were free to contest the constitutionality of the consent decree—is beside the point. The City does not claim that respondents are foreclosed from challenging its actions. It claims only that, on the merits, the consent decree shows that the City established the "strong basis in evidence" needed to justify an affirmative action measure and that the City's actions were "narrowly tailored" to further a remedial purpose (*Croson*, 488 U.S. at 500, 507-08). The Eighth Circuit explained this point in language that applies directly to the reasoning of the court of appeals in this case. *See Donaghy*, 933 F. 2d at 1457.[9]

The court of appeals agreed that the City had a sufficiently strong basis in evidence of past discrimination to

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[9] The Eighth Circuit said (933 F.2d at 1457):

> The flaw . . . is [to] equate[] the right to challenge a consent decree with a general right to be free of race-conscious employment decisions taken pursuant to a consent decree. . . . While *Wilks* permits a nonparty to challenge the validity of employment decisions made pursuant to a consent decree, it does not speak to whether a particular race-conscious employment decision taken pursuant to a consent decree will meet constitutional standards.

justify its decision to enter into the consent decree. Pet. App. 5a-6a. But if the City had a strong enough basis in evidence to conclude that it should enter into a consent decree requiring race-conscious promotions, then it must have had an equally strong basis in evidence to conclude that race-conscious affirmative action was warranted until it had achieved the long-range goal set in the decree.

4. Although the court of appeals' decision is technically interlocutory, it nonetheless fully warrants further review at this point. The effect of the court of appeals' decision is to place state and local governments across the nation in a condition of great uncertainty about the scope of their authority in one of the most sensitive and legally complex areas. That uncertainty will remain no matter what the fate of Chicago's particular affirmative action plan.

Before the Seventh Circuit's decision in this case, the courts of appeals were united—as we have shown—in their approval of the kinds of actions the City took here. But now, parties challenging affirmative action measures will of course rely on the en banc decision of the Seventh Circuit. No matter how influential that decision turns out to be—and, as an en banc decision involving one of the nation's largest cities, it can be expected to be quite influential—the uncertainty it creates will have the effect of chilling efforts by state and local governments to address the problems created by a history of discrimination. Alternatively it will leave state and local officials to speculate about whether the various courses of action they are contemplating will make them liable to nonminority employees objecting to affirmative action or to minority plaintiffs seeking redress for past discrimination. The court of appeals' decision will do this substantial damage, on the basis of erroneous reasoning, even if Chicago's affirmative action measures are ultimately upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OF THE

United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF THE PETITION OF CITY OF CHICAGO FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National Urban League and its affiliate the Chicago Urban League ("League") move the Court for leave to file the attached brief in support of the petition of the City of Chicago for a *writ of certiorari* to the United States Court of Appeals for the Seventh Court, which petition was filed with this Court on June 27, 1993. The petitioner has consented to the League's brief; respondent has not consented.

I.

NATURE OF APPLICANT'S INTEREST

At issue in this case is whether the Seventh Circuit will be allowed to supplant precedent with its own amorphous standard of constitutional review of affirmative action programs. The outcome of this case will be determinative of the guidelines for governmental affirmative action in employ-

ment and contracting, and of the ultimate and material impact of those guidelines on the employment opportunities available to millions of workers in the United States.

The National Urban League was founded in 1910. The Chicago Urban League, the largest of 113 affiliates, was founded in 1916 and is Chicago's oldest and largest race relations organization. The League addresses local and national issues that affect the lives of African Americans, other minorities, and the poor. The League works for the adoption of public policies that will benefit its constituents.

To this end, the League maintains an active role in designing, strengthening and monitoring affirmative action programs locally and nationwide. Yet, the League does not seek to file as *amici curiae* every time an affirmative action program is either challenged or struck down. Rather, it is the circumstances of this case — namely, the Seventh Circuit's attempt to establish a new and unattainable standard for constitutionally permissible race-based remedial programs — which require the League to join with other organizations to request that *certiorari* be granted.

II.

THE LEAGUE IS IN A UNIQUE POSITION TO ADVANCE THE REASONS THIS COURT SHOULD GRANT CERTIORARI

In deciding whether to grant *certiorari* in this case, the Supreme Court should hear not only from the petitioner and respondent, but also from those organizations which have for decades sought to move this country forward in the area of racial equity. For more than 80 years the League has been actively involved in the struggle to assure fair and equitable employment opportunities for all Americans regardless of race or ethnicity. Since its inception, the League has operated employment and training programs and has been a

strong advocate for public and private policies designed to promote fair and equitable hiring and promotional policies nationwide. And for decades, the League has conducted research and documented the tragic results on the lives of minorities when quality jobs are not accessible due to discrimination.

We now find that, in the wake of the Seventh Circuit's decision in *Billish v. City of Chicago*, decades of national consensus-building as to the constitutional parameters of affirmative action programs have been jeopardized. If allowed to stand, the inevitable result of the Seventh Circuit's decision will be the wrongful undoing of the hard-won gains of hundreds of thousands of minorities who seek access to the American dream.

The perspective offered by the League is necessarily different from that offered by the governmental defendants in this action. The League's interests and those of its constituents extend beyond the particular program challenged by respondents to include programs in public sector contracting and employment both in Chicago and nationwide. These interests are jeopardized by the Seventh Circuit's adoption of amorphous criteria — criteria which, if followed, would lead to the invalidation of all existing affirmative action programs. The League's experience in the monitoring, development and assessment of affirmative action programs contributes to the organization's unique expertise in the matters at issue in this action and to its ability to evaluate the Seventh Circuit's opinion in its broadest and most practical context.

III.

CONCLUSION

For the foregoing reasons, the National Urban League and Chicago Urban League respectfully move the Court for leave to file the attached brief as *amici curiae* in support of the petition of the City of Chicago for a *writ of certiorari.*

Respectfully submitted,

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QUESTION PRESENTED

Whether this Court should grant petitioners a *writ of certiorari* to determine whether the Seventh Circuit's strict scrutiny analysis of the petitioner's affirmative action program is consistent with the decisions of this Court.

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BRIEF OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF THE PETITION OF CITY OF CHICAGO FOR WRIT OF CERTIORARI

I.

INTEREST OF THE AMICI CURIAE

For countless decades, this country has wrestled with the pernicious legacy and ongoing disgrace of discrimination in hiring and promotions. Barriers to employment based on racial and ethnic discrimination continue to impede economic advancement for millions of Americans.

The National Urban League and Chicago Urban League ("League") have had a long-standing commitment to achieving racial and ethnic parity throughout all aspects of American society. To this end, the League has long been an advocate for fair and effective affirmative action programs to

remedy the effects of discrimination in employment. The League's membership includes a diverse constituency of labor, businesses and civic organizations all of whom understand the role that such programs play in the eradication of inequality.[1]

II.

SUMMARY OF ARGUMENT

This Court has continued to recognize the existence of racial discrimination in hiring and promotions, and has time and again affirmed the appropriateness of governmental bodies implementing race-based remedial policies as corrections to such practices. In 1989 this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), established a strict scrutiny standard for the constitutional review of affirmative action programs. Since then, federal courts have applied that standard consistently; some programs have been struck down, while others have withstood this heightened scrutiny. The interests of all parties to such programs are advanced when precedent is consistently adhered to and there is no confusion among the circuits, as is now the case.

This confusion has been created by the Seventh Circuit's ruling in *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993). The Seventh Circuit has jeopardized the existence of not only the Chicago Fire Department's affirmative action program, but of all affirmative action programs nationwide by establishing new criteria for constitutional review. Because other local governments have implemented similar if not identical remedial policies, the impact of this case will reach far beyond the two litigants. The League urges the Supreme Court to grant Petitioners a *writ of certiorari* from the Seventh Circuit's opinion in order to prevent the Sev-

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[1] The interests of the National Urban League and Chicago Urban League is more fully set forth in the motion for leave to file.

enth Circuit from inappropriately redefining the standard for review of governmental affirmative action programs, and wiping away years of wise, fair and sensitive public policy. The League speaks for millions of Americans in this effort to convince the Court to grant *certiorari* and reverse the Seventh Circuit.

III.

ARGUMENT

A. Croson Provides the Proper Standard of Review

Croson finalized two decades of evolving Court opinion as to the proper standard for legal review of government-operated affirmative action programs by establishing a strict scrutiny standard for such programs. Since *Croson*, federal courts have used this standard as the basis for reviewing affirmative action programs. At times, programs have been struck down for failing to meet strict scrutiny requirements. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (lack of predicate). Programs have also been upheld, again under the same standard of review. *See Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990) (County had a strong basis for conclusion that affirmative action was necessary and plan was narrowly tailored); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 875 (1992) (predicate existed, narrow tailoring achieved); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1948 (1992) (race-conscious relief justified by compelling state interest and relief was narrowly tailored). Overall, because *Croson* set forth a clear standard for review, and because the federal courts have correctly and consistently applied that standard, local governments have been able to proceed with public policies designed to remedy

discrimination by constructing programs that are within the bounds of the Constitution. As a result, barriers to minority advancement have been removed.

However, in *Billish*, the Seventh Circuit departed from this Court's standard of review and its application by lower courts by fashioning its own rules for determining the constitutionality of race-based remedial policies; this analysis has no grounding in twenty years of this Court's evolving positions culminating in *Croson*. If the decision in *Billish* is allowed to stand, then affirmative action programs nationwide are at risk for being found unconstitutional, not through any failure to satisfy strict scrutiny, but through the application of new and amorphous criteria created by the Seventh Circuit. The Seventh Circuit's criteria include maneuvering between Fourteenth Amendment and Title VII analyses, ascribing wrongful motives to governments seeking to remedy discrimination, ignoring a governmental body's fundamental interest in remedying the ongoing effects of past discrimination, and questioning the very validity of affirmative action policies adopted in a good-faith attempt to redress harm caused by a government's own discriminatory practices. *Billish, 989 F.2d* at 895-97. This deviation from *Croson* and departure from other federal circuits will undercut the standing of all affirmative action programs in this nation, and will return this country to the days when equal opportunity in public employment was left to the good graces of the employer.

The proper review for affirmative action cases is an equal protection review. *See Croson*, 488 U.S. at 467-77; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). This review begins with the acknowledgment that a governmental body has a fundamental interest in remedying the effects of the discriminatory barriers that it has created through its hiring and promotional practices. *Wygant*, 476 U.S. at 287; *United States v. Paradise*, 480 U.S. 149, 167 (1987). The

Court is "in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose." *Wygant*, 476 U.S. at 287; *See also Paradise*, 480 U.S. at 166; *Croson*, 488 U.S. at 491-92. This Court has consistently held to the position that, when properly designed, such policies are legitimate uses of a government's powers to rectify discriminatory practices, *see Paradise*, 480 U.S. at 166; *Croson*, 488 U.S. at 491-92, and that governments are not confined to simply implementing race-neutral prospective relief. *Paradise*, 480 U.S. at 173-74.

Thus, a proper analysis of race-specific remedial policies does not require, as would the Seventh Circuit, an inquiry as to whether or not such policies have a valid role to play in this country's efforts to eliminate racial discrimination in public sector employment. *Billish*, 989 F.2d at 897. ("There is concern and resentment about the use of policies of affirmative action or [more bluntly] reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons.") As this Court has time and again concluded, the affirmative actions policies do have an important and constitutionally valid remedial role. Citing the "concern and resentment about affirmative action programs amounts to improperly blaming the victim for the cost of a valid remedy.

The decisions in *Wygant* and *Croson* make it clear that the Seventh Circuit failed to apply the proper standard of review of the policies in question and instead chose to undercut this Court's steadfast commitment to the propriety of governmental action aimed at eradicating past and present discriminatory barriers in employment. Thus, this Court's review of the case at hand should be no different than what the Seventh Circuit's review should have been: this Court should evaluate, using an equal protection analy-

sis, whether the Chicago Fire Department's (CFD) race-based remedial promotional policies can be shown to be predicated in factual instances of discriminatory practices and can be shown to be narrowly tailored to redress only those discriminatory practices known to the CFD. *Wygant*, 476 U.S. at 277, 285; *Croson*, 488 U.S. at 499-500, 507. This Court should not, as did the Seventh Circuit, question the very validity of such public policies in American society. The remainder of this amici brief will show how the CFD's actions clearly pass this Court's standard for constitutional review; to find otherwise would lead to the evisceration of not only this affirmative action program, but countless other well-crafted, sensitive and sensible programs nationwide.

B. Governments Must be Allowed to Use Properly Constructed Statistical Showings of Disparities as Predicates for Affirmative Action Programs

The CFD designed its affirmative action program in ways that are consistent with *Croson* guidelines. The CFD established a *prima facie* case of discrimination by providing both anecdotal and statistical evidence of discrimination that established that the gross disparities between the racial compositions of the relevant labor pools for the jobs at issue and the racial composition of the holders of those jobs were due to discrimination.[2] In addition to providing initial evi-

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[2]In his letters to Commissioner Galante, Personnel Commissioner Hoskins provided ample testimony about the racially biased nature of CFD testing. In addition, the City repeatedly performed statistical analyses of hiring and promotions. For example, the City found that the difference between the expected percentage of minority engineers and the actual percentage was 8.7 standard deviations, and the difference between the expected and actual percentage of minority captains was 3.96 standard deviations. *Chicago Fire Fighters v. Washington*, 736 F. Supp. 923, 930 (N.D. Ill. 1990), *rev'd on other grounds*, 989 F.2d 890 (7th Cir. 1993). "A range of four to five standard deviations corresponds to a probability range of 1 chance in 15,786 to a 1 chance in 1,742,160."

dence of discrimination, the CFD followed Court guidelines and revisited the issue over time. The CFD concluded that further affirmative action was necessary in order to remedy the continuing discriminatory effects on advancement opportunities for minorities resulting from past and present discrimination.[3]

However, despite the CFD's findings that it discriminated in the past, the consent orders in which the CFD agreed to employ affirmative action programs as a remedial measure, and the great disparity between the percentage of minorities in the rank of firefighter and the higher ranks, the Seventh Circuit wrongly discounted the evidence as failing to constitute a disparity relevant to the showing of discriminatory practices in promotions at the CFD.

First, the Seventh Circuit incorrectly dismissed the labor pool used for comparison in the engineer promotions — the position of firefighters — as failing to constitute the relevant, qualified labor pool. *Billish*, 989 F.2d at 896-97. The court's reasoning in doing so was flawed. The Seventh Circuit hypothesized that the

> larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree. *Id.* at 896.

Ottaviani v. State Univ., 875 F.2d 365, 372 n.7 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Therefore, the numbers presented by the City fall well outside the realm of chance and, for purposes of establishing an affirmative action plan, provide the City with the "strong basis" needed to establish a race-specific remedial program. *See Croson*, 488 U.S. at 500.

[3]Personnel Commissioner Hoskins' letters to Commissioner Galante citing the need for continued affirmative action in order to overcome continuing effects of discrimination. *See Chicago Fire Fighters*, 736 F. Supp. at 925.

The Circuit goes on to speculate that this high percentage of firefighters may not only be an "artifact" resulting from a hiring quota in the previous decade, but that it came about through a hiring quota that the CFD implemented by lowering its standards in order to increase minority representation in the rank of firefighter. *Id.* at 896. Thus, since in the Seventh Circuit's opinion, the pool of firefighters does not reflect "qualified" persons for the position of engineer (the rank above firefighter) due to purportedly lowered standards for hire, then this pool cannot be considered the relevant labor pool for purposes of building a *prima facie* case for discrimination based on a statistical disparity in promotions to engineer.

This line of reasoning ignores the simple fact that the CFD instituted a hiring quota pursuant to the 1974 consent decree to increase minority representation in the rank of firefighter by purposefully increasing the number of *qualified* minority persons hired.[4] The increased minority representation in the position of firefighter achieved by the CFD was not achieved through lowered standards. Qualifications for hire remained as they were before the consent decree. The consent decree simply led the CFD to hire minority candi-

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[4]The 1974 Consent Decree (United States v. City of Chicago), paragraph 2 ("This long range goal and the interim hiring goal shall be subject to the availability of qualified black and Spanish surnamed applicants. . . . In no case shall defendant be required to . . . hire unneeded or unqualified employees in order to meet the goal, nor shall the City apply any standard for employment which does not validly measure qualifications required for the job of firefighter."), paragraph 4 ("[T]he City will make appointments of black and Spanish surnamed persons for the position of firefighter, from among qualified applicants . . ."), paragraph 5 ("In selecting from qualified applicants . . ."), and paragraph 6 ("In order to provide sufficient numbers of qualified black and Spanish surnamed applicants to meet the goals set forth . . . the city . . . shall contact community organizations and high schools with substantial minority enrollments, for the purpose of soliciting their help in informing minorities of employment opportunities in the Fire Department.").

dates at a higher rate than previously, if such candidates were qualified.

The Seventh Circuit's choice to dismiss the statistical disparity in racial composition between the ranks of firefighter and engineer was based not on this Court's guidelines as to the determination of the appropriate labor pool for comparisons in such cases, *see Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989), but instead on its own criteria for choosing a comparative pool. By hypothesizing that the labor pool was somehow tainted by earlier remedial actions to redress the effects of discrimination and thus irrelevant, *Billish*, 989 F.2d at 896, the Seventh Circuit in effect rendered any labor pool irrelevant. If the pool of firefighters is not relevant, then no labor pool is relevant, and no statistical disparity can be shown. Without such evidence, no predicate for affirmative action could exist.

The second instance of the Seventh Circuit's departure from established law and imposition of its own criteria for review occurred when the court approached the evidence by maneuvering between Title VII and equal protection analyses. *Id.* at 896-97. The Seventh Circuit was wrong to object to the CFD's remedial promotion policies for advancing minorities from lieutenant to captain. The court objected to these promotions on grounds that the CFD erred in concluding that the low level of minorities in the latter position was due to a legacy of discriminatory barriers to minority hiring prior to 1972. *Id.* at 896-97. The Seventh Circuit reached this conclusion by asserting that since Title VII did not come into effect until 1972, discriminatory hiring barriers to minorities prior to 1972 are "non-actionable," and thus cannot be used to bolster the CFD's contention that higher levels of minority representation would be seen in the ranks

of engineer, lieutenant and captain *but for* that pre-1972 "non-actionable" discrimination. *Id.* at 896-97.

However, it is clear that this case is an equal protection case under the Fourteenth Amendment, not a Title VII case. Under *Croson*, the CFD must have examined the history of its employment practices in order to implement race-based remedies, 488 U.S. at 495-500, and that history did not begin in 1972. Under the Fourteenth Amendment, actionable discrimination began when the Fourteenth Amendment was ratified by the states in 1868. The CFD recognized that the hiring policies implemented in 1974 for the rank of firefighter had, by the mid 1980's, resulted in a firefighter pool that was 29% minority. This minority representation would have been the true minority representation for all ranks at the CFD if the Department had never (prior to 1972) discriminated against minorities in the first place.[5] Thus, the CFD is completely correct to look at the discriminatory barriers to the hiring of minorities that existed before 1972, and the legacy of those barriers as manifest in the racial disparities that exist between the ranks as grounds for concluding that the disparity between minority representation in the rank of firefighter and the ranks of engineer, lieutenant and captain was a meaningful disparity.

A third instance of the Seventh Circuit's departure from established law is its analysis of the "narrow-tailoring" standard. *Croson* and *Paradise* established that one factor a

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[5] The CFD's approach appears to be consistent with statements articulated by Judge Posner. "[I]f minority firemen had been held back by . . . racially discriminatory tests, . . . so that they were lower on the career ladder than they would have been had the City never discriminated, the City would be free to depart from the rank order generated by the test results in order to correct the consequences of discrimination by putting things approximately where they would have been but for discrimination." *Billish v. City of Chicago*, 962 F.2d 1269, 1303 (7th Cir. 1992) (dissenting opinion) *vacated*, 989 F.2d 890 (7th Cir. 1993).

governmental body was to consider prior to implementing a race-based remedial measure was the existence of race-neutral measures. *Croson*, 488 U.S. at 507; *Paradise*, 480 U.S. at 171. The Seventh Circuit determined that utilizing unbiased tests, in compliance with the law currently, was a race-neutral measure that would obviate the need for other remedial measures. *Billish*, 989 F.2d at 897. This analysis of allowing current compliance to cure past discrimination is antagonistic to the Court's holding that affirmative action programs designed to remedy discrimination in a governmental body's hiring and promotional practices are legitimate. *Wygant*, 476 U.S. at 287; *Paradise*, 480 U.S. at 167. This analysis also contradicts the decision in *Paradise* that providing solely for race-neutral promotions prospectively "would have fallen far short of the remedy necessary to eliminate the effects of the Department's past discrimination." *Id.*, at 172-74.

The Seventh Circuit rejected the CFD's showing of a *prima facie* case for discrimination in its hiring and promotional practices, not through the application of a strict scrutiny analysis, but instead by imposing its own criteria for evidentiary review. *Billish*, 989 F.2d. at 895-97. This departure from precedent has not only jeopardized the well-crafted affirmative action program operated by the CFD, but places at risk all such programs nationwide. No government will be able to make a *prima facie* showing of discrimination pursuant to *Croson* if federal courts are allowed to conclude that any and all labor pools are irrelevant for purposes of statistical disparities on hypothetical grounds, and no program will be able to withstand a standard of review that fluctuates between Title VII and equal protection analyses. Nor will remedial programs survive the "narrow-tailored" review that limits remedial measures to current compliance. The Court has spoken clearly as to how evidence of disparities in hiring and promotion are to be approached by the courts, *Croson*, 488 U.S. at 500, 507; *Wygant*, 476 U.S. at

277, and other circuits have listened. This Court should remove any doubt that the approach created by the Seventh Circuit does not meet the standard that this Court has established.

C. Evaluation of the Narrow Tailoring of a Race-Based Policy Requires a Weighing of the CFD Policy's Remedial and Intrusive Effects

By the mid 1980's minority representation in the ranks of engineer and captain at the CFD had still not reached parity with the levels of minority representation in the relevant labor pool — the rank of firefighter. *Billish*, 989 F.2d. at 894, 896. The historical cause of this disparity was the CFD's discriminatory hiring practices, which were rectified in 1974 through implementation of hiring goals. *Id.* at 893. However, the contemporary cause and perpetuating mechanism for this disparity was the CFD's use of rank-order promotions based on racially-biased tests. All of the race-based remedial promotional policies implemented by the CFD were aimed solely at eliminating the effects of this mechanism of discriminatory promotional practices. And it is this fact that makes the strongest argument for finding that the CFD's promotional policies must pass this Court's second measure of constitutional review: the actions taken were narrowly tailored to correct only those discriminatory practices which were known to the CFD, and did not place undue burdens or hardships on nonminorities seeking promotional opportunities.

This Court has reached a clear definition of the meaning of narrow tailoring in the context of race-based remedial policies. In *Wygant*, this Court defined narrowly tailored policies to be those that remedy specific discriminatory practices but that "do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's

preference." *Wygant*, 476 U.S. at 287. In essence, this Court has reached an evaluative scheme for determining whether the affirmative action policies of a government are narrowly tailored. This scheme requires a court to weigh the remedial value of the policy in question against that policy's intrusion into the rights and protections of other individuals affected by those policies in order to determine whether a given policy is narrowly tailored. *Paradise*, 480 U.S. at 171.

Clearly, the CFD's policy of making out-of-rank-order promotions of black and Hispanic employees has a very high remedial value. Since it was the CFD's use of racially-biased tests to create rank ordering for purposes of promotion that was the mechanism that perpetuated disparities between the ranks in the first place,[6] the mitigation of the effects of these biased test-result rankings via the use of *some* non-rank-order promotions shows that the policy was narrowly tailored to remedy the effects of the discrimination at the CFD. The CFD's policy for remedying discriminatory promotional practices did not include actions that had no bearing on the cause of such practices. The high remedial value of this policy must then be weighed against its intrusion into the rights and protections of other individuals affected by this policy. *Id. at 182-83.*

Nonminority employees were never deprived of future opportunities for promotion as a result of the remedial actions taken by the CFD. First, the CFD attempted to implement a race-neutral test for promotions, which corresponds to this Court's decision that one factor which govern-

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[6]The 1980 settlement order implemented a race-based promotion remedy in order to increase minority representation in the higher ranks until ". . . new, validated promotion examinations . . ." could be developed and administered. *Billish*, 962 F.2d at 1282. The fact that these tests were, indeed, racially biased was established by the 1980 settlement order, which, "like a consent decree, was subject to judicial review and approval." *Id.*

ments should consider, prior to implementing race-based remedial measures, is alternative race-neutral remedies. *Croson*, 488 U.S. at 507. However, these attempts failed to correct the discriminatory barriers to promotion for minorities to the higher ranks. *Billish*, 962 F.2d at 1286-88. Only after failing to redress discrimination through race-neutral remedies did the CFD implement a race-specific promotional policy that included some out-of-rank-order promotions.

The out-of-rank-order promotions made by the CFD were not the only promotions made by the CFD under its race-based remedial promotional policy. The majority of promotions made were made in rank-order. *Billish*, 989 F.2d. at 892. Respondents contend that they would have been promoted sooner had all promotions always been made in rank-order. *Id.* at 892-93. Yet respondents do not (and cannot) contend that future promotions under the CFD's race-based remedial policy of mostly rank-order and some non-rank-order promotions would not have advanced them. In fact, since respondents remained higher on the rank-order listing after the latest round of promotions were made, they would likely be first to be promoted in the next round, since the CFD's race-based promotional policy always promoted those at the top of the rank-order listing first.

Moreover, respondents were never denied any positions in the CFD to which they had a vested right. *Billish*, 989 F.2d at 895. Since the tests used to rank the respondents were biased in their favor against the minorities who took the tests and were competing for these same promotions, the respondents' positions on the rank-order list cannot be viewed as being rightfully theirs. *Id.* at 895.

Therefore, since no future circumscription for promotion within the CFD has been enacted against these respondents (at most, these respondents were only delayed a promotion), and since no stripping of a vested right of these respondents

had occurred, the policy at issue did not unduly trammel their rights. Thus, the CFD's actions were of an only marginally intrusive nature.

These evaluations of the facts at hand are almost identical to the evaluations made by this Court in a very similar case — *United States v. Paradise* — in which this Court concluded that such actions were, indeed, not overly intrusive into the rights of nonminority employees. 480 U.S. 149, 177-86 (1987). If governments are to design race-based remedial programs they should be encouraged to create policies that resemble those which this Court has previously found to be narrowly tailored (such as *United States v. Paradise*). The policies implemented by the CFD clearly pass this Court's measure for a determination of narrow tailoring. The Seventh Circuit's decision in *Billish* failed to give consideration to both aspects of the policies at issue and instead dwelled on the question of intrusiveness. In its zeal to define all race-based policies aimed at eradicating barriers to minority advancement as being "reverse discrimination," the Seventh Circuit undermined the validity of government-operated affirmative action programs by casting aside precedent and concentrating on the supposedly over-intrusive nature of the policies. Its approach does not comport with this Court's deference to the validity of such programs, *see Croson*, 488 U.S. at 491-92; *Wygant*, 476 U.S. at 287; *Paradise*, 480 U.S. at 166-67; nor does it match the more careful and complete analyses given to such policies by other federal courts.

III.

CONCLUSION

For the foregoing reasons, the National Urban League and Chicago Urban League support the petition of the City of Chicago for a *writ of certiorari* to the Seventh Circuit and reversal of the ruling below.

Respectfully submitted,

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No. 93-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

In their brief in opposition to the petition for certiorari, respondents attempt to obscure the significance of the holdings of the en banc court of appeals. While respondents note that these rulings are interlocutory, that fact is of no practical significance—this is a decision of the en banc court which will control all subsequent cases in the circuit, including a subsequent appeal after remand. Waiting until this case is no longer in an interlocutory posture will accomplish nothing; until this Court reviews the questions presented by the petition, the holdings below will stand, sowing confusion and uncertainty in other circuits, and almost completely circumscribing the ability of public employers in the Seventh Circuit to redress prior discrimination voluntarily.

1. We explain in the petition that the first holding below—that a consent decree is irrelevant when assessing a public employer's justification for engaging in affirmative action in order to comply with that decree—is inconsistent with *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992), and *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992). In both of these cases, the court assessed the employer's justification for entering a consent decree, found it to be sufficient, and then weighed the employer's legitimate interest in complying with the decree when determining the permissibility of the employer's justification for race-conscious affirmative action. See 951 F.2d at 450-53; 933 F.2d at 456-61.[1]

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[1] Respondents accuse us of switching positions on this issue: they argue that when the City made the promotions at issue, it treated the consent decree as direct evidence of prior discrimination, while in the courts below, the City also relied on the history of the litigation leading to the consent decree. Even the majority below discerned no such change in the City's position. It left undisturbed the panel's finding that the City has always relied on the history of the litigation leading to the consent decree as one of its justifications for concluding that it had a constitutionally sufficient basis to engage in affirmative action. See Pet. App. 40a-41a.

Respondents attempt to torture the holding below so that it is not in conflict with *Stuart* or *Donaghy,* by asserting that the majority's holding on the significance of the consent decree is "directed as much toward *Croson*'s 'narrowly tailored' prong," Respondents' Brief In Opposition at 22, as it is to an employer's permissible justifications for concluding that affirmative action is warranted. Of course, by using this artful turn of phrase—"as much as"—respondents tacitly concede that the holding below did reject reliance on the consent decree as a permissible justification for engaging in affirmative action. Indeed, when the majority below assessed the City's permissible justifications for engaging in race-conscious affirmative action, it mentioned the consent decree not at all. Pet. App. at 6a-14a. Nor do respondents deny that this approach to a consent decree is squarely inconsistent with *Stuart* and *Donaghy.* In short, a reading of the opinion below that squares it with *Donaghy* and *Stuart*'s holdings—a public employer's need to comply with a consent decree it had justifiably entered is appropriately considered when assessing the propriety of affirmative action—is not remotely plausible.

Respondents suggest that the consent decree should be disregarded because in the seven years since its entry the conditions that had given rise to the need for the affirmative action called for in that decree had evaporated. See Respondents' Brief In Opposition at 22-23. Even the majority below did not embrace such an argument. As we explain in the petition, the consent decree contained a "long-range goal" requiring the City "to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made." Pet. App. at 21a. This provision plainly requires race-conscious affirmative action, and equally plainly requires the City to take such action until the racial imbalances that existed at the time of the

decree's entry have been rectified. As we explain in the petition, when the promotions at issue were taken, the City had not come close to remedying the imbalance to which the decree was addressed—in fact the imbalance had become even worse at the rank of captain because of the City's unjustifiable use of a stale, all-white promotional list. Pet. at 5-6.[2]

Contrary to respondents' assertion, Respondents' Brief In Opposition at 23, it is not our view that the consent decree forecloses an aggrieved plaintiff from attacking the propriety of action undertaken in order to comply with that decree. The constitutional test for whether a public employer has a sufficient justification to engage in affirmative action is not whether there is a consent decree that calls for affirmative action, but rather, whether the employer has a "strong basis in evidence for its conclusion that affirmative action was necessary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion)). See also *Shaw v. Reno*, 113 S. Ct. 2816, 2831-32 (1993). Our submission is that if an employer had "a strong basis in evidence" for its conclusion that it should enter a consent decree calling for race-conscious affirmative action because of the likelihood that, absent settlement, such a remedy would be judicially imposed, then the employer surely has a concomitant "strong basis in evidence" for its subsequent conclusion that it is justified in engaging in race-conscious affirmative action in order to comply with

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[2] Nor could anyone plausibly claim that the City could have concluded that it no longer had to comply with the decree in light of intervening legal developments. In 1985 the United States sought to modify the consent decree in order to remove the portions requiring race-conscious promotions. The district court denied the motion. *United States v. Albrecht*, No. 80 C 1590 (N.D. Ill. Aug. 23, 1985). The United Sttaes did not appeal. Chicago Fire Fighters R. 71 at Exh. H. Thus, the decree remained in force and the City was required to obey it on pain of contempt. Pet. App. at 37a-38a n.8.

that decree and, thereby, to redress the discrimination that gave rise to the decree.

Our position thus reflects the view taken by the First Circuit in *Stuart* and the Eighth Circuit in *Donaghy*. The dissenting judges below took this view as well: they analyzed the evidence confronting the City at the time it decided to enter the consent decree, and concluded "that the City of Chicago's assessment that its policies violated the Constitution was a realistic one." Pet. App. at 36a. But the majority below refused to even consider whether the City had a strong basis in evidence for concluding that it should enter and then comply with the consent decree. That holding leaves public employers in the untenable position where they could have been fully justified in entering a consent decree calling for race-conscious affirmative action, but are not permitted to advance their need to comply with such a consent decree when that affirmative action is later challenged. If a public employer justifiably enters a consent decree calling for race-conscious affirmative action, then surely the Constitution permits the public employer to comply with that decree. Under the opinion below, however, the law in the Seventh Circuit does not.

2. In defending the majority's rejection of statistical evidence as part of a public employer's rationale for determining that it is warranted in engaging in affirmative action to correct prior discrimination, respondents argue that while statistical evidence of a "manifest racial imbalance" may justify affirmative action under Title VII, "[w]hen an affirmative action plan is challenged on constitutional grounds, as is the case here, the manifest imbalance test is wholly inappropriate," Respondents' Brief In Opposition at 24.

This position can be squared with neither this Court's precedents nor the law in other circuits. In *Croson* itself, this Court recognized that "[t]here is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of

a pattern of practice of discrimination.' " 488 U.S. at 501 (quoting *Hazelwood School District v. United States,* 433 U.S. 299, 307-08 (1977)). Accord *Wygant,* 476 U.S. at 274-75 (plurality opinion); *id.* at 292 (O'Connor, J. concurring in part and concurring in the judgment). On at least two other occasions, this Court has relied in part on statistical evidence of manifest racial imbalances between an employer's workforce and the racial composition of the qualified labor pool in upholding race-conscious affirmative action under the strict scrutiny test. See *United States v. Paradise,* 480 U.S. 149, 167-69 (1980) (plurality opinion); *Local 28 of the Sheet Metal Workers' International Association v. EEOC,* 478 U.S. 421, 440-42, 480-81 (1986) (plurality opinion); *id.* at 484-88 (Powell, J., concurring in part and concurring in the judgment). As authority for their position, respondents cite only footnotes in *Johnson v. Transportation Agency,* 480 U.S. 616 (1987), and those footnotes, curiously, only point out that *Johnson* presented no constitutional issue for the Court to decide. See *id.* at 620 n.2, 630 n.8, 633 nn. 10 & 11.

The law in other circuits is quite clear concerning the propriety of statistical evidence of racial imbalance when assessing a public employer's justification for concluding that some measure of affirmative action is required to redress prior discrimination. In *Vogel v. City of Cincinnati,* 959 F.2d 594 (6th Cir. 1992), the court wrote: "Evidence of wide statistical disparities, however, may justify an affirmative action policy adopted by a public employer." *Id.* at 599. The court sustained the affirmative action plan in that case by comparing the racial composition of the Cincinnati police to the racial composition of the qualified labor pool. See *id.* at 599-600. In *Stuart v. Roache,* the court rejected Stuart's attack on the statistical evidence utilized to justify Boston's affirmative action plan: "Plaintiffs, however, misinterpret the *Croson* Court's rationale for dismissing the significance of statistical evidence in that case." 951 F.2d at 450. Statistical evidence comparing the racial composition of a promotional rank

with the composition of the pool of persons qualified for promotion to that rank, in the court's view, supplied a constitutionally sufficient justification for the affirmative action plan at issue. See *id.* at 451-52. In *Donaghy,* the court approved of the affirmative plan at issue in part because the City "demonstrated that the plan was a response to a conspicuous racial imbalance in its workforce." 933 F.2d at 1460. To similar effect, see *Associated General Contractors, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1414-15 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992); *Coral Construction Co. v. King County,* 941 F.2d 910, 918-19 (9th Cir. 1991), cert. denied, 112 S. Ct. 875 (1992); *Cone Corp. v. Hillsborough County,* 908 F.2d 908, 915-16 (11th Cir.), cert. denied, 111 S. Ct. 516 (1991).

Respondents suggest that statistical proof may be permitted even under the majority's opinion below "if the city can muster competent evidence of either post-1972 statutory violations or pre-1972 constitutional violations," Respondents' Brief In Opposition at 25. But the precise type of statistical evidence that, under this Court's decisions and the law in other circuits, is appropriate to establish a prima facie case of unconstitutional discrimination —comparisons between the racial composition of a promotional rank and the racial composition of those qualified for promotion—have already been branded by the majority below as "no evidence" of unconstitutional pre-1972 discrimination, Pet. App. at 13a. And because, as the majority below correctly observed, it "is implausible" that any significant amount of the statistical imbalance within the Chicago Fire Department is due solely to discrimination occurring between the point in 1972 where Title VII became applicable to the City, and the point in 1974 when the first consent decree was entered, Pet. App. at 12a-13a, the narrow time frame in which the majority below is willing to consider statistical evidence is of no practical significance.

Respondents' complaint that the statistical evidence presented by the City is a "confusing array," Respondents'

Brief In Opposition at 25, is also impossible to reconcile with the precedents. The statistical evidence in the record —comparing the racial composition of each promotional rank to the racial composition of the rank eligible for promotion, see Pet. at 4-8—is precisely the type of statistical comparison on which the First Circuit relied in *Stuart*, and the Eighth Circuit relied in *Donaghy*, in upholding affirmative action plans for police promotions. For that matter, such inter-rank comparisons were relied upon by this Court in *Paradise*, in which it noted that inter-rank comparisons demonstrated that "[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a department hierarchy dominated exclusively by nonminorities." 480 U.S. at 168 (plurality opinion). The same is true here. As the dissenting judges below explained—without factual contradiction from the majority—the Chicago Fire Department's discriminatory hiring practices effectively prevented minorities from even entering the Department until the late 1970's, when they finally began to be hired in significant numbers, and the Department's discriminatory promotional practices, which were not eradicated until the 1980 consent decree, further prevented minorities from advancing in the Department. Pet. App. at 18a-22a. Even respondents never claim that the gross racial disparities between the ranks were the product of some nondiscriminatory statistical fluke—plainly they are the product of practices that the United States successfully sought to enjoin.

In *Stuart*, the First Circuit explained the relevance of statistical evidence of inter-rank racial disparities:

> In the present case, however, the "comparison" figures do not appear to reflect simply general "societal" discrimination. The Decree compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimal qualifications needed to become sergeants. The fact that, of the latter pool, 4.5 percent of the officers are black, as opposed .45 percent who became sergeant, at least cast doubt on the fairness

> of the promotion process and requires further explanation.

951 F.2d at 451. After noting that the record showed that the Boston Police Department had hired few blacks until the 1970's, the court added:

> One obvious reason, then, why there may have been few black sergeants in the Boston Police Force in 1978 is that the Department had not hired many black police officers before 1970. Since unjustified discrimination accounted for the latter fact, the latter fact cannot excuse the former.

Id. at 452.

Respondents speculate that here there may be some "innocent causes" for the gross statistical disparities found in this record, Respondents' Brief In Opposition at 26, but they supply no such explanation, and none can be found in the record. There is no suggestion in the record either that minorities do not wish to join the Chicago Fire Department, or that they do not wish to seek promotion once in it.[3] The record shows that once discriminatory hiring practices ended, minorities eagerly sought to be hired and promoted. Indeed, there is no affidavit or other evidentiary material in the record suggesting any "innocent explanation" for these gross statistical disparities. The majority below speculated, without record support, that "the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree." Pet. App. at 11a. This is the

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[3] Respondents attempt to dispel the inference of unconstitutional discrimination these statistics create by noting that in the original discrimination case brought by the United States, the district court found that the United States had failed to prove that the City had intentionally discriminated against minorities. Respondents' Brief In Opposition at 25 n.16. But the judgment of the district court was reversed on appeal, and the court of appeals found it unnecessary to reach the constitutional claims because it provided the United States with all the relief it sought on statutory grounds. See *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). Thus the district court's unreviewed finding counts for quite little.

only "innocent explanation" for these gross disparities ever advanced (though not by a party) in this litigation. And yet, as amici the National Urban League and Chicago Urban League point out, the district court imposed that minority hiring requirement solely to redress prior unlawful discrimination, and its order required that only qualified minorities be hired. The fact that a court had ordered the City to hire qualified minorities in order to redress prior discrimination hardly "taints" the composition of the pool of firefighters qualified for promotion with unqualified minorities.

3. We also point out in the petition that the affirmative action promotions at issue were narrowly tailored because minorities were promoted in close approximation to their representation in the qualified labor pool, and the minorities promoted had test scores statistically indistinguishable from the nonminorities who were passed over. We also point out that two circuits have held that employers may depart from strict rank order use of an employment examination in order to reduce the adverse impact of the examination, when the minority candidates who are benefitted have qualifications statistically indistinguishable from the nonminority candidates they pass over. Pet. at 28-29. The Seventh Circuit's holding that a departure from strict rank order in itself creates a genuine issue of fact as to whether the City had some invidious motive to favor minorities is inconsistent with those decisions.

Respondents note that the City may be able to prove at trial that it did depart from rank order use from the promotional examinations at issue for appropriate reasons. See Respondents' Brief In Opposition at 28-29. But they ignore the impact of the majority's holding that speculation alone creates a genuine issue of fact. In their brief, respondents identify no evidence in the record that supports the majority's speculation that the City's actual motive for engaging in affirmative action was "to curry favor with" minorities. See Pet. App. at 14a.[4] We know

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[4] Indeed, respondents' position on this point diverges sharply from the position they took in both the district court and the court

of no such evidence. And it is settled law that a party may not avoid summary judgment through mere speculation. A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

Any plaintiff, of course, can speculate that an employer's motive for engaging in affirmative action is to curry favor with minorities. If such speculation is sufficient to survive summary judgment, then, as we explain in the petition, every affirmative action case must be tried. No matter how clear the documentary evidence is supporting an affirmative action plan, an employer can take no affirmative action without the risk of enormous backpay awards when, years later, a jury makes ad hoc employment policy for that employer. If affirmative action necessarily carries such enormous legal risks and uncertainties, as a practical matter it surely will be doomed. And with its demise, the ability of employers to redress voluntarily discrimination at the promotional level (where race-neutral means like more active recruitment of minorities cannot be utilized) will also disappear. If employers wish to ameliorate the effects of prior discrimiation at the upper ranks, they must either wait until all incumbents retire, or wait to be sued and lose on the merits. Affirmative action as such will be effectively abolished, a step even the majority below recognized this Court is not prepared to take. Pet. App. at 5a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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of appeals. In both courts, they argued that there were no genuine issues of fact in this case.

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